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THE

CONSTITUTION

OF

THE UNITED STATES

COMPARED WITH OUR OWN.

BY

HUGH SEYMOUR TREMENHEERE.

143187

. . . "juxta sequitur jactantior Ancus,
Nunc quoque jam nimium gaudens popularibus auris."

VIRGIL.

LONDON:
JOHN MURRAY, ALBEMARLE STREET.
1854.

[*The Author reserves to himself the right of authorising a Translation of this Work.*]

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INTRODUCTION.

THE state of our representation being probably about to be considered in the ensuing Session of Parliament, there will be a natural disposition in many minds to take a survey of some of the other systems of representative government which, equally with our own, have for their object the establishment of a rational freedom.

Such representative governments are indeed but few. The hopes formed during upwards of thirty years of peace were dissipated (it is to be hoped only for a time) by the events of 1848; and the civilised world has been compelled to mourn over the failure of nearly all the attempts then made to add to the number of free governments, or to widen the foundations of liberty in those that did exist.

Into the much-disputed question of the causes of those failures, it is not my present purpose to enter. Suffice it to say, that whoever has made them the subject of impartial study, must have found those latter years of continental history fertile in warnings as to the peril of delay when the season for salutary reform is fully come, and abounding in examples of the greater fault, of ruining all the hopes of temperate and reasonable ameliorations, by presumption, precipitancy, or personal ambition.

The instances on the continent of Europe in which the national liberties have for the first time emerged out of the struggles of the last six years, or have been extended and fortified by them, are but few; and we could scarcely expect to derive from those cases, or from the other constitutional governments of the Continent, instruction upon the particular points which are soon about to occupy us here. The course of those changes on the Continent has indeed been watched attentively in this country, and with much public sympathy; and it has been satisfactory to observe that where success has been greatest in the new career of freedom, as in Sardinia, it has arisen from the fact that her social arrangements have enabled her to adopt political institutions most nearly resembling our own. Belgium and Holland have derived strength and confidence from the danger which at one time threatened them; and their free governments have been found to rest on a secure basis of patriotism and public spirit. Denmark, still occupied in adjusting her constitutional powers, has maintained the integrity of her territory, and has won for herself a high place in the estimation of Europe by her loyal, brave, and constitutional stand against aggression.* Norway, depending on her strong

* The battle of Idsted, in which, in 1851, the small Danish army defeated and destroyed the forces of the Frankfort Parliament, "recruited by many thousands of volunteers from the Prussian Army, and led by many of the most distinguished military men in Prussia, lent by the Prussian Government for the occasion," is said by military authorities to have been the most scientific battle fought since the peace of 1815. (Laing's Denmark and the Duchies. 1852.)

national feeling for the preservation of institutions which suit her circumstances, has remained unassailed. Sweden has not yet entered upon the long-projected amendments of her cumbrous political system. Prussia, together with the smaller German States, are still in the leading-strings of Bureaucracy, and have yet much to do towards attaining a well-regulated liberty, worthy of the great German people. Spain and Portugal have made no very apparent progress towards infusing the true spirit of freedom into the forms of free government, which have hitherto in their hands been little more than instruments of arbitrary power and bad faith. Over the rest of Europe, from the Pyrenees to the Carpathians, the experience that had been gathered, and the hopes that had been formed of constitutional liberty, have for the time been overwhelmed and scattered, and men have now to wait the growth of maturer councils, or of that solidity and strength of moral character, and that temper and self-restraint in political action, without which the framework of constitutional government serves but the purposes of corruption or oppression.

If from none of the above we are likely to derive political lessons of any great value to ourselves at this particular moment, when we are about again to pass in review our own political arrangements with the expectation of amending some few of them, we naturally turn next to the great community on the other side of the Atlantic.

We are led to ask whether the new form of free government, established in the United States in 1789,

offers any peculiarities which might be usefully adopted here, or whether experience has there brought to light any defects in theory or in practice, which may be regarded as warnings for ourselves.

Desirable as such an inquiry may be at the present moment, it is not a very easy matter to pursue it. It may indeed be not difficult for any one to possess himself of a copy of the Constitution of the United States—a document occupying a few pages only—or to refer to it in any work of modern history. But a perusal of the document itself will advance him very little on his way towards understanding the objects at which it aimed, the reasons on which it was founded, the contrasts and analogies it presents to our own and to all previous forms of free government, and the lessons to be learnt from the sixty-five years of experience to which it has now been subjected.

To attain that knowledge, even any intelligent citizen of the United States must have recourse to voluminous and learned works, which require time and study to master. The principal of these are the "Commentaries" of Mr. Justice Story, and those of Mr. Justice (afterwards Chancellor) Kent, the first in three, the second in four thick octavo volumes. Next in value and importance, are the papers forming the collection of the "Federalist," written by some of the leading statesmen of the time of the separation from this country. Equal to these is the very learned and admirable "Defence of the American Constitutions" against the attack of M. Turgot, by Mr. John Adams, afterwards the second President of the Republic.

(London, New Edition, 1794, 3 vols.) Then follow the numerous volumes of reports of the decisions of the Supreme Court of the United States; also various other books of legal authority, such as Tucker's edition of "Blackstone's Commentaries;" and, lastly, the masterly analysis by M. de Tocqueville, of the social and political condition of the people of that country.

I am not aware that any attempt has been made to place before the public in this country in an accessible shape, the Constitution of the United States, set in the light thrown upon it by some of the highest minds which that country has produced; illustrated by some portions of the experience which time has brought forth; and contrasted with those principles and practices which we cherish as the main supports of our system of constitutional government.

It appears to me that there are public reasons why this task should be undertaken at this period; and at the risk of executing it imperfectly, I venture to put together the results of such reading and personal inquiry as, during some years past, I have from time to time been able to bring to bear upon the subject.

I purpose following very nearly the arrangement of Mr. Justice Story in his "Commentaries," and shall, in the first place, state in as compendious a manner as is consistent with clearness, the substance of that learned judge's remarks and opinions, upon each of the most important articles of the Constitution.

To this I shall add, where desirable, the observations of the authors of the "Federalist," and also those of Mr. Justice Kent, under the same heads, together with

extracts from any other writers whose facts and opinions may seem worthy of consideration in connection with those of the above principal authorities.

And, finally, I shall take occasion to point out the essential differences between the system of government in the United States and our own, and draw such conclusions from those points of difference as the facts may justify, and as may seem important to be kept in mind at a time when we are about to touch the framework of our own system with a view to its further amendment.

It is proper to say a word or two more as to the high character of the American works which I am about to follow.

The "Commentaries" of Professor Story stand at the head of all the writings on the subject of the American Constitution, and, in conjunction with his other works, have acquired for their learned author a judicial authority of the first order throughout Europe. He was appointed in 1811 one of the Justices of the Supreme Court of the United States. He also obtained the "Dane" Professorship of Law in Harvard University, near Boston, and in that capacity published his "Commentaries on the Constitution of the United States," in the year 1833. The edition which I have quoted from is the last, that of 1851. (Boston.)

These Commentaries occupy the same place in literature as an exposition of the Constitution of the United States, as is occupied by "Blackstone's Commentaries upon the Constitution and Common Law of England." They are conspicuous for their calm tone,

correct style, and measured language, no less than for careful research and strictness of reasoning. Though a faithful citizen of the United States, and a patriotic admirer of the main principles of her Constitution, he is too bold to disguise his disapproval of what he deems imperfections, too honest to conceal his fears, and too sincere a lover of truth to shrink from or pervert it.

Next in authority are the "Commentaries" of Mr. Justice Kent, Judge of the Supreme Court of New York, and Professor of Law at Columbia College in the same State. This voluminous and learned work is chiefly occupied with comments on the common law; but the considerable portion devoted to the Constitution of the United States is not less characterised by a spirit of fairness and truthfulness than the work of Mr. Justice Story. It is, under some heads, more copious, and abounds in valuable notes bringing down the experience of the working of the Constitution to the year 1844.*

But the great sources of constitutional doctrine from which these and other writers have alike "drawn by far the greatest part of their most valuable materials," are "The Federalist,"† an "incomparable commentary of three of the greatest statesmen of their age" (Mr. Madison, Mr. Hamilton, and Mr. Jay); and also the highly-esteemed judgments of Chief Justice Marshall upon constitutional law. "The former have discussed the structure and organisation of the national

* New York. 1844. † New York. 1802.

government, in all its departments, with admirable fulness and force. The latter has expounded the application and limits of its powers and functions with unrivalled profoundness and felicity."* To these are to be added the Reports of Dallas, Crank, and Wheaton, of the decisions of the Supreme Court of the United States; other collections of judicial reports, and the statutes of the various States; Rawle on the Constitution; and the journals of Congress. I have found in the British Museum all of the above which I had not at hand.

Of the works of M. de Tocqueville,† it is unnecessary to speak. Their accuracy and impartiality are as universally acknowledged as the high powers of observation and analysis which they display.

I shall have occasion to notice more recent facts which have come before the public since the date of these several writers, partly collected by myself in that country in 1851, partly obtained since, chiefly from public sources of information.

From the materials derived from the above sources, I shall draw any inferences and institute any comparisons which may strike me as instructive, and desirable to be borne in mind in this country.

January, 1854.

* Story. Preface, p. 1.

† De la Démocratie en Amérique, published in 1835, Translated by Henry Reeve, Esq. 2nd Edition, 1836. Second Part of M. de Tocqueville's Work, Paris, 1840.

THE CONSTITUTION OF THE UNITED STATES COMPARED WITH OUR OWN.

CHAPTER I.

DIFFERENT PRINCIPLES OF GOVERNMENT IN THE DIFFERENT COLONIES WHILE THEY REMAINED UNDER BRITISH RULE.

POLITICAL reasonings upon the state of a country, and speculations as to its future course, are too apt to be conducted without sufficient reference to its previous history. This appears to be frequently, and perhaps not altogether unnaturally, the case with respect to the United States; for the present vast proportions of that great community have, in their rapid growth, shut out the view, and very nearly extinguished the thought, of all

that lies in the obscurity of the past beyond them.

But neither the state of society in the United States, nor the spirit of its Constitution, can be thoroughly understood or properly appreciated without a previous knowledge of the different principles of government which prevailed in the different States while they remained under British rule.

I propose, therefore, in this introductory chapter, to give a very summary sketch of the constitutional arrangements that existed in the American colonies before their separation from the mother country.

The Governments of the original thirteen States are described by Judge Blackstone in his "Commentaries," as Provincial, Proprietary, and Charter Governments. But this description, though correct in an historical point of view, and interesting in reference to the various steps and processes in the settlement of that country, affords no key to those causes, which, in the words of Mr. Justice Story, "have impressed upon each colony

peculiar habits, opinions, attachments, and even prejudices." *

The existence of those different "habits, opinions, and attachments," in different parts of the Union, is very generally overlooked in a superficial view of the state of things in that country. That they exercised great influence at the time of the separation from us, in determining the kind of government then adopted, there can be no doubt. And they have not ceased to act powerfully, in a social, as well as a political point of view, up to the present day.

Those differences are traceable to the different forms of government originally given to, or adopted by, the different States; and further, to their adoption with greater or less strictness, or their rejection, of the principle of the English common law in regard to the descent of property.

Ten out of the original thirteen States possessed, down to the time of the Revolution, forms of government, all of which, with some

* Page 1.

varieties of detail, bore as strict a resemblance to our own as was possible under the circumstances of a new country. They may all be described as moderate constitutional governments. The governor was the king's representative; and the Crown also appointed a council, which was to a certain extent an upper house of legislature; not invested, however, with independent legislative power, but acting as a consultative body and in concurrence with the executive. On the other hand, the principle of popular freedom was recognised, in the authority given to the governor "to convene a general assembly of representatives of the freeholders and planters." The provincial assembly thus constituted, had power (in the words of the different charters) "to make local laws and ordinances not repugnant to the laws of England, but as near as may be agreeable thereto, subject to the ratification or disapproval of the Crown."

The States that possessed this form of government were Virginia, Massachusetts (including New Hampshire and Maine), Mary-

land, New York, New Jersey, Pennsylvania, Delaware, North Carolina, South Carolina, and Georgia.

Of these, it is only necessary to advert in any detail to the first two.

Virginia, "the first permanent settlement made in America under the auspices of England," under the Charter of James I. to Sir Thomas Gates and his associates, in the year 1606, possessed originally, in accordance with the limited views of the age in those matters, very few political rights. But in 1619, a representative assembly was called together by the governor; and in 1621, the council of the company in England gave permanence to this act, by an ordinance vesting the legislative power, "partly in the governor, who held the place of the sovereign, partly in a council of State named by the company, and partly in an assembly composed of representatives freely chosen by the people." No law was to be in force "until ratified by a general court of the company, and returned under its seal to the colony." And the ordinance "further re-

quired the general assembly, and also the council of State, to imitate and follow the policy of the form of government, laws, customs, and manner of trial, and other administration of justice used in the realm of England as near as may be." Although this form of government was shortly after overthrown by a process of "quo warranto" (1624), it was re-established in nearly the same form by Charles I.; and the Revolution of 1688 found the colony, "if not in the practical possession of liberty, at least with forms of government well calculated silently to cherish its spirit." *

The course of public opinion in Virginia is strongly marked by two circumstances in the legislation of that colony—the supremacy of the Church of England, and the strictness of entails.

By one of the earliest Acts of the colonial legislature, the Church of England was established, "and its doctrines and discipline were strictly enforced." The clergy "were amply provided for by glebes and tithes," and "the

* Story, § 49.

performance of parochial duties peremptorily required." "The first law allowing toleration to Protestant dissenters was passed in the year 1699;" but, subject to this, "the Church of England seems to have maintained an exclusive supremacy down to the period of the American Revolution." *

With regard to entails, an Act was passed in the colony in 1705, to prevent their being barred by the ordinary process of fine or recovery, and requiring "a special Act of the legislature in each particular case." Though subsequently modified so as to exclude small estates under 200*l.* in value, the general law remained in force to the period of the Revolution; and, "in this respect, the zeal of the colony to secure entails and perpetuate inheritances in the same family outstripped that of the parent country." *

Massachusetts obtained from William and Mary, in the year 1691, the Charter, under which its government was conducted down to the time of the Revolution. The charter is

* § 50.

described by Story as containing a liberal grant of authority to the province, and a reasonable reservation of the royal prerogative.

The principle of popular freedom had already taken deep root in Massachusetts, and in the other New England colonies which were by this charter incorporated with it. There are few events in history more striking and eventful than the landing of the small band of refugees from religious persecution—"the Pilgrim Fathers,"—on the bleak and forbidding shores of Cape Cod, in the winter of 1620, and their first act, their drawing up and signing their simple and voluntary compact of government. By this instrument they "covenant and combine themselves together into a civil body politic, for the better ordering, and preservation, and furtherance," of the ends they had in view,—namely, the founding of a colony "for the glory of God, and the advancement of the Christian faith, and the honour of their king and country." And although they subsequently applied for and obtained from the Plymouth Company in Eng-

land, such power as that company could give, to confirm their legislation, yet they never received any powers from the Crown itself, but continued to exercise, under their original compact, "the most plenary executive, legislative, and judicial authority," until they were incorporated with the province of Massachusetts by the charter above mentioned, in 1691. In a similar spirit the company that obtained from Charles I. the Charter of 1628, constituting them a body-politic, under the title of "The Governor and Company of Massachusetts Bay, in New England," (in continuation of the Charter of 1620, to "The council established at Plymouth, in the county of Devon, for the planting, ruling, ordering, and governing of New England, in America,") first took the bold step of transferring themselves and their charter to the territory granted to them, and next proceeded to extend their acts far beyond the expressed powers of government granted by that charter, which they would not admit as "furnishing any limit to them upon the freest exercise of legislative, executive, or

judicial functions." "They did not view it as creating an English corporation under the narrow construction of the common law, but as affording the means of founding a broad political government, subject to the Crown of England, but yet enjoying many exclusive privileges." *

The Charter of 1691 strengthened this union of free legislative action with the reasonable prerogatives of the Crown. "It reserved to the Crown the appointment of the governor, lieutenant-governor, and secretary of the province;" and "provided for the appointment of twenty-eight councillors, who were chosen by the general court." This general court was to consist of "the governor and council for the time being, and of such representatives being freeholders as should be annually elected by the freeholders of each town, who possessed a freehold of forty shillings annual value, or other estate to the value of forty pounds." "Each town was entitled to two representatives," subject to alterations in

* §§ 65. 67.

this number, which might be introduced from time to time by the general court. To the governor was also reserved the right of "nominating, and with the advice of his council, appointing to all military and judicial offices, those of the Court of Admiralty excepted, which were reserved to the Crown. And the general court was invested with full power to levy taxes, "and make all wholesome laws and ordinances, so as the same be not repugnant or contrary to the laws of England." "All laws, however, were to be sent to England for approbation or disallowance," and if disallowed by the Crown within three years, they were to become void.*

Under the previous charters, and by the legislation that took place by authority of them, most of the "public rights of Englishmen," known in those days, were secured by the colonists. Under this Charter of 1691, whatever liberties had been omitted were gradually introduced; a "Habeas Corpus" Act, which was at first disallowed, having been ex-

* § 71.

tended to the colonies in the reign of Queen Anne.

Entails were recognised by the law, but not encouraged by the policy of the State. Nevertheless, the principle of preferring the eldest son was so far admitted, that in cases of intestacy a double portion was assigned to him.

In regard to ecclesiastical matters, liberty of conscience was granted by the Charter of 1691, "to all Christians, except Papists;" and "ample provision" was made "for the congregational church, exclusive of all others."*

The above were the general principles of government and legislation in the two "original and parent colonies;" and the eight others already enumerated† followed in the same general course. Maryland received its first Charter in 1632, and its first legislative assembly was held in 1634. Its charter is remarkable as containing no clause requiring the transmission of the laws passed in the province, to the Crown, for its approval. New York, at the Revolution of 1688, declared itself

* § 71. † Page 4.

entitled to all the privileges of British subjects, and, in 1691, on the arrival of the governor appointed by the Crown, proceeded to call a legislative assembly, and to pass Acts declaratory of their rights and privileges as Englishmen. New Jersey, in 1664, adopted a similar form of government, which was continued by the Charter of Queen Anne, of 1702. Pennsylvania dates its government, of the same form, from 1681, and Delaware from 1703; North Carolina from 1662, after which followed the impracticable, highly aristocratic constitution of John Locke, which filled the interval from 1669 to 1693, and which was, after some intervening troubles, succeeded by the constitution of 1720: South Carolina dates her constitution from 1732, and Georgia from the year 1751.*

And in these same States, the descent of property was—in the largest and perhaps the most important of them—in New York, in North and South Carolina, and in Georgia—the same as in England, and remained the

* §§ 74 to 145.

same in the Carolinas until the year 1791. In New York, indeed, "the common law course of descents appears to have been silently but exclusively followed; and perhaps New York was more close in the adoption of the policy and legislation of the parent country before the Revolution than any other colony."* In Pennsylvania, Delaware, and New Plymouth, the eldest son, in case of intestacy, was to have a double portion. The sole exception among these States to this course of policy was Maryland, in which estates were made partible among all the children.

In this large group of States, therefore, comprising ten out of the original thirteen, a moderate system of representative government, with a full acknowledgment of and acquiescence in the due prerogatives of the Crown, subsisted from the period of their first charters of government, down to their separation from this country; and at the same time, during the whole of that period, embracing, in most of the cases, upwards of a

* § 114.

century, the habits and feelings engendered by such a form of government, and by the descent of property in more or less strict conformity with the custom of the mother country, existed in full force in each of those colonies.

The remaining three only of the thirteen original colonies—New Plymouth, Connecticut, and Rhode Island—were in their first organisation thoroughly democratic. The first of these, the brave and hardy colonists before mentioned,* in number only forty-one adult males, who landed at Cape Cod in the depth of an American winter, drew up and signed before their landing, on the 11th November, 1620, the memorable compact by which they established for themselves a simple form of government, "in its essence a pure democracy," and under which they proceeded to elect a governor and other officers, and to enact laws. Connecticut, or rather the three towns that then formed the State, framed in 1638 its own constitution, by which it was provided that there should be two general assemblies annually, and

* Page 7.

that there should be annually elected by the freemen, a governor and six assistants, and as many other officers as might be found requisite. The towns were to send deputies to the general court, apportioned according to the number of freemen; in which general court was vested the supreme power—legislative, executive, and judicial. Rhode Island, settled by refugees from the religious tyranny of the Independents of Massachusetts, in 1636–8, established a form of government for themselves, which was subsequently confirmed in the main by the Charter of Charles II.; a charter which, with the characteristic indifference of the day, sanctioned the democratic principle of the election of the governor and all the other official persons. The executive power was vested in the governor, deputy-governor, and ten assistants; the legislative in the general assembly.

Although the New Plymouth colonists soon sought the aid of the authority of the Crown in support of their legislation, and "under the colour of delegated sovereignty" (a Charter

from the Plymouth Company in England, which was never recognised by the Crown), exercised all the powers of government until they were finally incorporated with the province of Massachusetts under the Charter of William and Mary, in 1691; and although Connecticut, "aware of the doubtful nature of its title," obtained in 1662 a Charter of government from Charles II., and Rhode Island, in the same manner sought the support of the Crown, as above adverted to; the example of their bold and independent course, in founding for themselves a form of government resting on the broadest principles of civil freedom, strengthened the spirit of liberty, which had already a legitimate field of action in all the other States. Rhode Island also "enjoys the honour of having been, if not the first, at least one of the earliest of the colonies, and indeed of modern States, in which liberty of conscience, and freedom of worship, were boldly proclaimed among its fundamental laws." The charter, on the petition of the inhabitants, for "full liberty in religious concern-

ments," declares the royal will and pleasure, "that no person within the colony shall be any wise molested, punished, disquieted, or called in question, for any differences in opinion in matters of religion."

It is remarkable, that in Rhode Island, notwithstanding the democratic principles on which its constitution was founded, the counterbalance of the law of entail was maintained with the greatest tenacity. Mr. Justice Story thus describes the general course of legislation on that subject:—

"In respect to the descent of real estates, the canons of the common law were adopted, and the eldest son took the whole inheritance by primogeniture. This system was for a short period repealed by an Act (4 & 5. Geo. I., 1718), which divided the estate among all the children, giving the eldest son a double share. But the common law was soon afterwards (in 1728) reinstated by the public approbation, "as necessary to prevent the destruction of family estates,"* and so remained to regulate descents until a short period (1770) before the Revolution."†

Connecticut also directed, that in cases of intestacy in respect to real estate, a double

* § 101. † § 100.

portion should go to the eldest son;* and the original New Plymouth colonists had no other "general basis of their jurisprudence than the common law of England;" which, though varied to meet "their stern notions of the absolute and universal obligation of the Mosaic institutions,"† was revived in full force when they submitted to come under the same law as Massachusetts.

Reviewing, therefore, the principles of government on which the States of the Union had been founded, and were acting at the time of the Revolution, and considering how decidedly the custom of entail was supported by the legislation and by the prevailing sentiments of some of the largest and most important of them, was recognised in nearly all the rest, and was prevented by law in only one (Maryland), it can be no matter of surprise that one of the leading statesmen of the time, Mr. Jay, should, in a letter to Washington, of January 7, 1787, while their future Constitution was yet undecided upon, advert to these facts, and urge

* § 93. † § 55.

them in argument, stating that the proposed government for the Union should be suited to their manners and circumstances, "which are not strictly democratical;"* or that Mr. John Adams, in the same year, should follow a similar line of argument, founded on the fact of the number of persons of large and hereditary possessions then existing throughout all the thirteen States.† It places also in the strongest light the amount of the provocation, the glaring character of the injustice, the blind perseverance in error on the part of this country in opposition to its best and most eloquent statesmen, which must have been required to alienate sympathies which had for so many generations been so much in harmony with our own, and to provoke to resistance minds and hearts that knew nothing to love and venerate so much as the institutions and the glory of the country from which they sprung. All this must have been

* Correspondence of the American Revolution, by Professor Jared Sparks. Boston, 1853. Vol. iv. p. 136.

† Adams's Defence of the American Constitution, vol. iii. Letter 4.

needed to cause an ear to be lent to those principles of government which emanated from the temporary disappointments and ill usage of Locke, and from the moral and social anarchy of the French school; which were new to the experience of mankind; which find no warrant in the best and greatest republics of antiquity; and which, whatever may be their intrinsic merits, and their adaptation to the circumstances of so vast an extent of territory as that occupied and waiting to be occupied by the United States, were not adopted (as will be hereafter shown) without the gravest misgivings on the part of some of the wisest men of the Revolution; which are varied already in some important respects from what they sanctioned; and are regarded with anxiety for the future by many of the most enlightened American citizens of the present, as they were of the past, generation.

CHAPTER II.

PROGRESS TOWARDS INDEPENDENCE.

THAT communities, founded and nurtured as above described, should have combined to resist oppression, was no more than natural, and is a circumstance in the history of our race, at which, with Lord Chatham, "in the name of our common liberties and common character, we may be permitted to rejoice," however much we may still lament the errors and prejudices which obscured the judgment of this country at that important period.

The steps which gradually prepared the public mind in America for resistance, and marked their progress towards independence, require to be briefly adverted to, because they

take their origin from a time long prior to that of the ultimate cause of disagreement and separation.

The favourite democratic theory of the foundation of the civil rights of the American colonists is, according to Jefferson and others holding similar extreme opinions, that they brought with them "the rights of men," of "expatriated men." There is no need to repeat the well-known refutations of this assumption, and to show that there is no foundation in reason or history for any such abstract political rights; and that no two men, generally speaking, can be found to agree in defining what they mean, and how far they may be extended. It is sufficient for the present purpose to refer to the authority of the best American lawyers, who are agreed upon resting their civil rights upon a much more definite and intelligible principle. Mr. Justice Story states the matter thus:—"The universal principle (and the practice has conformed to it) has been, that the common law (of England) is our birthright and inheritance,

and that our ancestors brought hither with them, on their emigration, all of it which was applicable to their situation."* This also was the opinion of the Congress, as laid down in their celebrated Declaration of Rights, of the 14th of October, 1774. They unanimously resolved, "That the respective colonies are entitled to the common law of England," * * and that "their ancestors at the time of their emigration were entitled" (not to the "rights of men," but) "to all the rights, liberties, and immunities of free and natural-born subjects within the realm of England." And they further resolved, "that they were entitled to the benefit of such of the English statutes as existed at the time of their colonisation, and which they have by experience respectively found to be applicable to their several and local circumstances."*

This being so, the American colonies very early assumed the right in their legislative assemblies to deal with both the common and statute law according as their circumstances

* § 194, note.

required. The only limitation upon their legislative power was contained in an express clause of all their charters, to the effect that their laws should not be repugnant, but, as near as might be, agreeable to the laws and statutes of England. "A very liberal exposition of this clause seems, however," says Mr. Justice Story, "always to have prevailed, and to have been acquiesced in, if not adopted by the Crown."* The only part of the common law which they were in practice restrained from altering was that which related to their allegiance, and of the statute law, those Acts of Parliament which particularly related to them, and by which they were expressly bound;† and the interpretation given to this limitation confined it in theory, if not at first in practice, to matters of trade and commerce, and to regulations which bound them in a general system as integral parts of an empire.‡

These rights of independent action they steadily vindicated, and indeed extended, in their constant refusal to submit to taxation

* § 187. † 7 & 8 Will. III. c. 22. § 9. ‡ § 173.

without their own consent. Some of the colonies very early asserted, and attempted to act upon, that principle; as Massachusetts in 1640; and in 1651 and 1660 in reference to the Navigation Acts. And although that State frequently in subsequent years, and as late as the year 1757, acknowledged the general supremacy of Parliament,* she excepted the case of submitting to taxation without her express consent. And even the southern States, which were in general most disposed to recognise the authority of the Crown and Parliament, "denied the right to tax them internally to exist anywhere but in their respective legislatures."†

The passing of the Stamp Act in 1765 gave a further impulse to this feeling of independence, and strengthened the determination to assert it; and although that Act was afterwards repealed, the subsequent attempt to raise a revenue on importations into the colo-

* Story, § 188.

† §§ 189, 190. Declaration of the Congress of the Nine Colonies assembled at New York, October, 1765.

nies was as strenuously resisted as the former mode of taxation. In the glowing words of Burke, "They augured misgovernment at a distance, and snuffed the approach of tyranny in every tainted breeze."

One of the features most noticeable at the commencement of this great struggle, is the moderation of the language and conduct of the colonists, which was as conspicuous as the firmness with which they persevered in vindicating their rights and liberties. This moderation in the midst of so great a crisis, which, if it had been met in a similar spirit by the people of England, would have altered the whole character of the course of events, is traceable to many circumstances of the political and social existence of the colonists, which ought not to be lost sight of even in the present day. As has been shown above, by far the greater number of the colonial constitutions owed their origin to no extreme political views and opinions; but, in their moderate and temperate admixture of the several powers of government, were very similar to

the constitutional system which had been gradually acquiring strength and consistence in the mother country. The prerogatives of the Crown were clearly defined and cheerfully recognised in the proprietary and charter governments, and although attempts at aggression on the part of the Crown in the provincial governments were met by the strenuous and successful opposition of the provincial assemblies, yet even in the latter governments most of the well-established and ordinary prerogatives were exercised without dispute.* The representative system was organised on a moderate basis, and consisted for the most part of two portions; one elected by the freeholders, the other, or the council to assist the governor, nominated by the Crown. The similarity of social institutions between the colonies and the mother country was kept up throughout the whole of the southern States, and in Rhode Island among the northern, by favouring the custom of primogeniture and the law of entails; and even in the rest of the

* § 160.

northern States the principle was recognised to a certain extent, by assigning a double portion in case of intestacy to the eldest son. To this there was but one exception, that of the small State of Maryland. The long existence, and the general predominance throughout the Union, at the time of the Revolution, of political and social institutions such as these, are facts which should not be forgotten, inasmuch as they account for the very English tone of mind (if I may be allowed the expression) of most of the leading American statesmen of that day, which resulted also in part from an education and training, in most respects, entirely English. They account also for the elaborate system of checks against the encroachments of ultra-democracy introduced into the Constitution with so much care and caution by those who drew it up, and for the existence in it of such strong and carefully-guarded conservative elements, which appear to be commonly overlooked by modern politicians of the extreme school. They afford an explanation also of the phenomenon which

strikes a stranger in the United States even at this day, namely, that of the strongly aristocratic organisation and feeling of social life in that country; wherein are seen ancient sympathies, strong and irrepressible associations, instincts of cultivation and of nature, asserting their empire, and rising above the level attempted to be maintained by forced habits and a specious but unphilosophical theory.

CHAPTER III.

THE REVOLUTIONARY GOVERNMENT.—THE CONFEDERATION.

BEFORE examining the details of the Constitution, it is necessary to advert briefly to the course of events that immediately preceded it.

All attempts at reconciliation having failed on both sides, the legislatures of some of the States, and conventions of the people in others, proceeded to appoint delegates, who assembled on the 4th September, 1774, and formed the first general and national Government, commonly known, from its origin, as "the Revolutionary Government."

Having adopted a Declaration of Rights, passed Acts forbidding all commercial relations between themselves and Great Britain, authorised the raising of troops, and appointed

General Washington as their commander-in-chief, they embarked upon the great struggle, and finally, on the celebrated 4th of July, 1776, published the Declaration of Independence.

The powers of the Revolutionary Government being vague and doubtful, discussions arose and were continued during the next few years among the several States, and it was not until the 1st of March, 1781, that the whole of the States assented to the "Articles of Confederation," prepared and digested by a Committee of Congress. On that date the final ratification took place, and the Government of the Confederation was announced and recognised.

Still, however, the defects in the political arrangements then agreed to were many and patent. "To form a permanent union," remarked the Committee above referred to, "accommodated to the opinions and wishes of the delegates of so many States, differing in habits, produce, commerce, and internal police, was found to be a work which nothing but time

and reflection, conspiring with a disposition to conciliate, could mature and accomplish." It was not a matter capable of being "struck out at a heat," and required the patience and the wisdom of men accustomed to look at all the sides of great and complicated questions, and the experience of years to enable them to gather new counsel from novel circumstances. "Although," says one of the able men who took a leading part in those proceedings, Dr. Rush, "we understood perfectly the principles of liberty, yet most of us were ignorant of the forms and combinations of republics."* It need not, therefore, be a matter of surprise that inexperience on the one hand, and the jealousies of individual States on the other, should have combined to render the powers entrusted to the Confederation imperfect, and to hamper its action to so great a degree, as to cause it to be little more than a government in name only. It had no authority to levy taxes, no power to enforce obedience, no means of regulating foreign or domestic com-

* Story, § 244, note.

merce, no national courts. It was invested with but "a delusive and empty sovereignty."* It, indeed, finished the war, and signed the treaty, by which the independence of the revolted colonies was acknowledged; but it could not pay its debts, or even its current expenses. It could only incur expenses, and call upon the States to provide the means of payment. But the power to levy the sums demanded, had been jealously retained by the several States. The extent to which, as late as the spring of 1787, the different States had complied with or refused the requisitions of Congress, is thus given by Mr. Justice Story, on the authority of a member of the New York Legislature:—"During the last five years, New Hampshire, North Carolina, South Carolina, and Georgia had paid nothing; Connecticut and Delaware about one-third; Massachusetts, Rhode Island, and Maryland, about one-half; Virginia, three-fifths; Pennsylvania, nearly the whole; and New York, more than her quota."† The refusals or de-

* § 245.

† § 259, note.

lays were justified under various pretexts; some plausible, as being founded on the alleged injustice and inequality of the provisions of the Articles of Confederation, as well as the importance of its omissions. But the leading statesmen of the day were unceasing in their calls upon the different States, to satisfy first the just demands upon them, and to sustain the credit and honour of the Confederation, and then to discuss their individual claims and grievances. "Many solemn and affecting appeals" were made to them by Congress, and also by individuals. Mr. Jay, writing to Washington, on the 27th of January, 1786, says, in a letter full of apprehensions for the future,— "There is doubtless much reason to think and to say that we are woefully, and in many instances wickedly misled. Private rage for property suppresses public considerations, and personal rather than national interests have become the great objects of attention."* Washington had before expressed his apprehensions

* Correspondence of the American Revolution, by Professor Jared Sparks, Boston, 1853, vol. iv. p. 136.

that the course of things was tending to "anarchy and confusion," and that so many sacrifices might prove to have been made in vain.* "The domestic debt sunk down to about one-tenth of its nominal value."† Serious dissensions arose among the States themselves, "and were fostered to a high degree, so as to threaten at once the peace and safety of the Union."‡

* § 256. Marshall's "Life of Washington," vol. v. p. 47.
† § 257. ‡ § 260.

CHAPTER IV.

THE CONSTITUTION.

It was, therefore, not until after thirteen years of trial and of struggle, of tentative efforts in the new career of self-government, and failures in the difficult task of adjusting conflicting powers and reconciling adverse interests, that on the 17th of September, 1787, the Convention, to which the whole subject had been referred, finally adopted the plan of the present Constitution. This was again referred by Congress to a "convention of delegates, chosen in each State by the people thereof;" and the proposed plan having been ratified by eleven out of the thirteen States, Congress appointed the 4th of March, 1789, "for the first meeting under the new Constitution." On the 6th of April Washington was elected

president, "and on the 30th he was sworn into office, and the Government went into full operation in all its departments."*

But the Constitution had not come into existence without encountering many difficulties and much violent opposition. It was carried in six out of the thirteen States by only small majorities, and in three out of those six, Massachusetts, Pennsylvania, and Virginia, "by little more than a preponderating vote."† One party throughout the Union was in favour of a constitution embodying the powers proposed, because they were anxious for the "exact observance of public and private engagements;" another strong and active party was violently hostile to it, because disposed to evade both.‡ It was stigmatised as unequal, unjust, and oppressive; by some of the large States from fear of losing their importance; by some of the smaller from apprehension of being over-

* North Carolina adopted the Constitution in November, 1789, and Rhode Island in May, 1790. "Thus all the thirteen original States became parties to the new Government," § 278.

† § 281. ‡ § 286.

borne. It was, however, finally acquiesced in as "a system of compromise and conciliation," in which the strictness of abstract theory was made to yield to a just consideration for particular interests and even prejudices, and some "inequality of benefit" was submitted to "for the common good."*

It has been a matter of much discussion by the statesmen and public writers of the various parties in the United States, whether the Constitution is to be considered as a treaty between independent States, or a federal, or a social compact, or both? And the inclination of the public mind on this question has been, from time to time, a subject of great importance, in reference to the conflicting interests and opinions of the North and the South, on vital objects of public policy. If, as has been argued, it is a treaty or a compact only, then any State might withdraw from the confederation at pleasure and dissolve the connection; and thus the Government of the Union would

* § 296.

be reduced to "a mere confederation during pleasure." *

The determination of this point involves the whole question of the foundation of civil government.

In arguing it, Mr. Justice Story adopts the limitations placed upon the doctrines of Locke by Paley and Burke, and by able writers also of his own country.

"If," he argues, "the doctrine of Locke, that all civil government is founded upon consent, be in a general sense true, it is nevertheless to be taken with many limitations and qualifications," because a State, however organised, "embraces many persons in it who have never assented to its form of government; and many who are deemed incapable of such assent, and yet who are held bound by its fundamental institutions and laws. Infants, minors, married women, persons insane, and many others, are deemed subjects of a country, and bound by its laws, although they have never assented

* § 328.

thereto, and may by those very laws be disabled from such an act." He adds, that neither the Constitutions of the State Governments, nor that of the United States, can be said to be founded upon the consent of the whole people. Nor were they founded upon the consent of even the whole of that portion of the people who were by the law qualified voters in each case, but only on that of the majority of such qualified voters. He affirms * that "there is not, probably, a single State in the Union, whose Constitution has not been adopted against the opinions and wishes of a large minority, even of the qualified voters; and it is notorious that some of them have been adopted by a small majority of votes;" and "in respect to the American Revolution itself, it is notorious that it was brought about against the wishes and resistance of a formidable minority of the people."† Who are or are not to be deemed qualified voters is a matter, in all the States of the Union, resting on no doctrine of abstract right, but held to be within the dis-

* §§ 308–321. † §§ 329, 330.

cretion and competence of the actual possessors of the franchise, acting under a sense of their responsibility as trustees for the public good. But the decision of these qualified voters, through their representatives, having been duly expressed, the Constitution passed from the nature of a compact into that of a law; it became "a fundamental law, of absolute paramount obligation," not to be dissolved (in the words of Burke), except under the pressure of supreme and inevitable necessity, and by the deliberate choice and determination of the same power that enacted it.* The language of the Constitution itself, in its sixth article, declares it to be the "supreme law of the land;" and appoints as its arbiter and interpreter, not the varying wills or occasional interests of the individual States, but those high judicial functionaries whom, in its third article, it expressly designates for that purpose.

And this last-mentioned peculiarity in the Constitution of the United States is one which ought constantly to be borne in mind in consi-

* §§ 338–372.

dering it, or in instituting comparisons between it and other systems of government. According to our own law and practice, an Act of Parliament once passed becomes part and parcel of the law of the land. Not so always or necessarily an Act of the Congress of the United States. If that Act should, in the opinion of the judges of the Supreme Court, be contrary to the written words of the Constitution, it is, *ipso facto*, void and of no effect. "The Constitution" is the supreme power (not the united act of the legislative and executive power of the State in each particular case, as with us); "the judicial power extends to all cases of law and equity under it; and the Courts of the United States are, and in the last resort, the Supreme Court of the United States is, vested with this judicial power."* The judgments of the Courts of the United States upon constitutional questions are "of paramount and absolute obligation" throughout all the States; are "conclusive and binding upon the citizens at large;" and

* § 376.

if any attempt be made to alter the written words of the Constitution, such attempt can only be successful by the concurrence of two-thirds of both houses of Congress, or of the legislatures of two-thirds of the States, in proposing, and of the legislatures of three-fourths of the States in ratifying, the change.*

Not only has the Supreme Court of the United States the power of determining whether "the laws of Congress, or the acts of its president, are contrary to, or warranted by, the Constitution," but it has also constantly exercised this power of final interpretation over the acts of the legislatures of the individual States. And in so doing it has been sustained by public opinion, which has in all cases determined that such power resides in the Supreme Court under the terms of the Constitution. The question has been frequently raised; by Virginia in 1798, by Kentucky in 1800, and by other States at different times; "but," says Mr. Justice Story, "it may be asserted with entire confidence, that for forty years,

* Article 5 of the Constitution.

three-fourths of all the States composing the Union have expressly assented to, or silently approved, this construction of the Constitution, and have resisted every effort to restrict or alter it." *

The reason why this great power should be placed in the judges of the Supreme Court, and not elsewhere, is stated by one of the greatest legal authorities of the United States, the late Chief-Justice Marshall, (in an able judgment upon this important question, in the case of Cohens *v.* Virginia, given in vol. vi. of Wheatstone's Reports, pages 384 to 390; Story, § 392, note,) to have been, that the judges of the Supreme Court are, by the Constitution, appointed "during good behaviour," in other words, for life; whereas the judges in many of the States are appointed for short periods, "and are dependent for office and salary on the will of the legislatures; and the Constitution of the United States furnishes no security against the universal adoption of that principle." And when "we observe the im-

* § 391.

portance which that Constitution attaches to the independence of judges, we are the less inclined to suppose that it can have intended to leave these constitutional questions to tribunals where this independence may not exist;" more especially as the questions which had arisen between the States and the general Government had been such as these, namely, whether certain just debts contracted by some of the States should be paid by them, or certain taxes, imposed by Congress, collected; questions which, if determined in the negative by the imagined self-interest of the individual legislatures, could hardly be expected to be otherwise determined by judges appointed by those legislatures, and depending upon them for their tenure of office.

The State legislatures have no such check upon them as is afforded by the submission of their Acts to an independent tribunal, which can determine, if the question should at any time be raised, whether they have or have not exceeded their lawful powers. Consequently, "violations of the State Constitutions are more

likely to remain unnoticed and unregarded." The legislatures of the individual States may, by a vote determining upon a constitutional amendment, "change, with few limitations, the whole structure and power of Government, and thus legalize any present excess of power." * Many of them, as above mentioned, have actually exercised such power, against the wishes of large minorities.†

This power of immediate action upon the legislatures of the several States, by those invested with the franchise, is in stricter correspondence with the ultra-democratic ideas and principles existing in Europe. But it has no place in the Constitution of the United States, which is the ideal commonly referred to by the advocates of republican government, because it is the one more widely known, and occupies the prominent place in the public eye when turned towards that country. The principles of the State governments, and their particular arrangements in regard to the amount and distribution of popular power, are less known

* § 395. † Page 41.

because less conspicuous; and their practice not such as, if more widely known, would be likely to recommend them as models of purity of administration, or as considerate depositories of supreme power, or always as strict assertors of law and justice.

CHAPTER V.

THE PREAMBLE.

THE preamble of the Constitution declares, in substance, the importance, the advantages, and in regard to many particulars, the absolute necessity, of a national Government.

These positions are so indisputable that there will be no need to follow the commentary upon each separate statement of the preamble itself. They command at once our assent, as they declare the aim of the national Government of the United States to be in no respect different from what we should assert of our own.

There are two points, however, which Mr. Justice Story adverts to, as having been especially designed to be established by the framers

of the Constitution, which it will be instructive to notice.

The preamble recites that the Constitution was framed in order, among other things, to "establish justice;" and the learned commentator's remarks upon that clause* show, in relation to one great branch of justice, namely, the payment of debts, how great was the need of some over-ruling authority to compel the individual States to the observance of good faith in those matters, both towards each other and to individuals. He says that, "besides the debts due to foreigners, the public debt of the United States was left utterly unprovided for; and the officers and soldiers of the Revolution, who had achieved our independence, were, as we have had occasion to notice, suffered to languish in want, and their just demands evaded or passed by with indifference." "Laws were constantly made by the State legislatures, violating, with more or less degrees of aggravation, the sacredness of private contracts; laws compelling the receipt of a depreciated and depreciating paper

* §§ 485–6.

currency, in payment of debts, were generally, if not universally, prevalent; * * laws authorising the delivery of any sort of property, however unproductive or undesirable, in payment of debts, upon an arbitrary or friendly appraisement," and several other laws of the same nature. "In the rear of these came the systems of general insolvent laws, some of which were of a permanent nature," and others "had so few guards against frauds of every kind by the debtor, that in practice they amounted to an absolute discharge of any debt, without anything more than a nominal dividend; and sometimes even that vain mockery was dispensed with."* "The local tribunals were obliged to obey the legislative will; and in the few instances in which it was resisted, the independence of the judges was sacrificed to the temper of the times."† These descriptions, and much more to the same effect, apply to the period of the Revolutionary Government, and the confederation, between 1774 and 1789. The power to sanction such departures

* § 487. † § 487.

from honesty and justice has, by the Constitution of the United States, been taken away from the legislatures of the individual States, in some of the above particulars. The events, however, of only a few years ago, in regard to the "repudiation" of their debts by many of the States, show that there is no security against the recurrence of such aberrations from principle, among communities where the numerical majority has the controlling power, and is able, under the pressure of some temporary suffering, or some excited feeling, to overbear all that is honourable and enlightened among their fellow-citizens. A notorious instance of the inability of the legislature and of the executive of a State to cause the law to be enforced when resisted by popular clamour, has, for the last twenty-seven years, continued to be exhibited by the great and populous State of New York, almost within sight of the Houses of Legislature, in the case of the forcible occupation of the large estates of a portion of the Van Ransalaer family by the tenantry, who refuse either to pay rent

or to give up their occupation. They are sufficiently numerous to have been able to elect the local officers, without whose aid the law cannot be enforced. Those newspapers of the State which possess any sense of the public interest and dignity, frequently call for either the vindication of the law by an adequate employment of the public force, or a satisfactory compromise between the parties; but hitherto without effect; and this great scandal still exhibits, in the twenty-seventh year of its existence, one of those "defects of justice" which the Constitution of the United States has no power to interfere with, but which could never occur under institutions which give due place and weight to the portion of the community incapable of submitting to such a stain.*

Another object of the United States Constitution, was, according to the preamble, "to

* A decision has recently been given in the Supreme Court of the State of New York, adverse to the claims of the Van Ransalaer family; but its justice, after so long a period of years, is much disputed; and the present determination of the point does not excuse the flagrant and successful resistance to the law as it stood.

insure domestic tranquillity," or in the words of the "Federalist" upon that portion of the Constitution, "to guard one part of society against the injustice of the other part," if their peace, safety, or interests should be threatened by an adverse party or faction. The danger of the whole power of the State falling into the hands of a faction is one to which pure republican governments are especially exposed. "If a majority be united by a common interest, the rights of a minority will be insecure."* It was a main object with the framers of the Constitution to devise means for protecting the rights of minorities; or rather, what is more effectual, for enabling minorities to protect themselves. These means, which are comparatively weak in the more purely republican governments of the individual States, are, in the "compound republic" of the United States, to use the expression of one of the able writers of the "Federalist," sought for, by placing power in the hands of so many parts, interests,

* Federalist, No. 10.

and classes of citizens, "that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority." This is precisely the same principle which has always been so conspicuous in the British Constitution, and which has always insured a full hearing to every interest however small, and however apparently at variance, in its instincts and sympathies, with the great majority of influential opinions in the State. It is this which justly gives it its air of true and liberal freedom; which makes every man who lives under it, feel that he possesses in himself, and in those united with him, a guarantee against oppression. On this point there is no difference of principle between our Constitution and that of the United States. The difference is only in the modes of attaining the same end. We look to the independent powers of our ancient or modern corporations, to the distinct and peculiar powers and privileges of our church and universities, to our hereditary and independent House of Lords, to the fair re-

presentation of all classes and interests in our House of Commons by such a distribution of the franchise as will enable representatives of all classes to obtain a place there. The Constitution of the United States looks to the "great variety of interests, parties, and sects which it embraces," as the security against a coalition of a majority to overbear the wills, and affect the interests of a minority, by sudden and hasty acts of legislation. Which of the two best answers its purpose, we need not at this moment stop to argue. It will be entered upon elsewhere. No human institutions are perfect; but in intention and principle the Constitutions of Great Britain and of the United States are on this important point the same. Both seek to break the force of majorities, and, as it were, to stay their hand, until the majorities themselves have had time for mature reflection, and until minorities have been able to exercise the effort, always difficult even to the calmest minds, of looking at questions that threaten their interests or thwart their opinions, from the points of view

that lead to the conclusions which are prevailing against them. It is thus only that minorities can have time to prepare for, and adjust themselves to, the coming change.

However temperate and forbearing in principle and intention, and therefore similar to our own, the Constitution of the United States may be in those particulars, the constitutions of the individual States partake very little of that spirit, and the tendency of the whole of them has been, from the period of the Revolution to the present day, to weaken or do away with any checks or impediments that existed in their original forms of government, upon the immediate action of the numerical majority of voters, and thus to assimilate themselves more nearly to pure democracies. The particulars of these changes will be found in a future page.

CHAPTER VI.

NECESSITY OF SEPARATING THE LEGISLATIVE, EXECUTIVE, AND JUDICIAL POWERS.

THE necessity of the separation of the three great powers of a State—the legislative, the executive, and the judicial, is a truth so elementary, that it requires in this country no argument to enforce it. "It is," says Paley, "the first maxim of a free State;" and Montesquieu had before observed, that there can be no liberty where those three powers are not kept distinct.*

Accordingly, Mr. Justice Story remarks, that "it is no small commendation of the Constitution of the United States, that instead of adopting a new theory, it placed this practical truth as the basis of its organisation."†

* Esprit des Lois, Liv. xi. c. 6. † § 524.

The judicious blending of these powers to a certain limited extent, as noticed by Blackstone, does not militate against, but strengthens this principle, by promoting unity of action between the whole, without infringing upon the independence of either. Thus the sovereign of this country "is a part of the Parliament;" the Crown appoints the judges, but cannot remove them; the House of Lords possesses both legislative and judicial powers; the House of Commons exercises the power of impeachment; and the judges occasionally "assist in the deliberations of the House of Lords by giving their opinion upon matters of law referred to them." This same blending of these three powers exists also in a similarly limited and useful manner in the Constitution of the United States; and it is a point which has been defended by all the ability of the authors of the "Federalist," and the framers of the Constitution. In the constitutions, however, of several of the States, a less regard is paid to this vital principle of liberty; and in many of them, it has been entirely aban-

doned; both the appointment and the payment of the judges having in some of the States been assumed by the legislature, while in others the judges have to submit to the ordeal of a popular election once every few years.

Impressed with the conviction that the independence of the judiciary is the great guarantee for the maintenance of the Constitution of the United States, and aware of the tendencies of the public mind in many of the individual States to overrule that principle, Mr. Justice Story, following the authors of the "Federalist," labours to remind his countrymen of the necessity of maintaining "some practical means" for the security of the judiciary "against the meditated or occasional invasions" of either of the other two powers. He shows that, of the three powers, the judiciary "is incomparably the weakest,"* and that the danger most impending over their country was that of the usurpation by the legislative bodies of all the powers of the State. "In a representative republic, where the executive magistracy is

* § 531.

carefully limited, both in the extent and duration of its power," and where the legislative power is exercised by an assembly responsive to the passions of the multitude, and capable of giving effect to those passions, "it is easy to see that the tendency to usurpation is, if not constant, at least probable; and that it is against the enterprising ambition of this (the legislative) department, that the people may well indulge all their jealousy, and exhaust all their precautions."* He adds, that under their forms of government, the legislative body

"Has the pride as well as the strength of numbers. It is easily moved, and steadily moved, by the strong impulses of popular feeling and popular odium. It obeys, without reluctance, the wishes and the will of the majority for the time being. The path to public favour lies open by such obedience, and it finds not only support but impunity, in whatever measures the majority advises, even though they transcend the constitutional limits. It has no motive, therefore, to be jealous, or scrupulous in its own use of power; and it finds its ambition stimulated, and its arm strengthened, by the countenance and the courage of numbers. These views are not alone those of men who look with apprehension upon the fate of republics; but they are also freely admitted by some of the

* § 533.

strongest advocates for popular rights and the permanency of republican institutions. Our domestic history furnishes abundant examples to verify these suggestions."*

He then asks, what is the remedy? Does it lie in frequent appeals to the people, in the hope of their speedily correcting their own errors? He answers, "But if these be frequent, it will have a tendency to lessen that respect for, and confidence in, the stability of our institutions, which is so essential to their salutary influence."† Neither is it probable that they would be successful; for "temporary feelings and excitements, popular prejudices, an ardent love of theory, an enthusiastic temperament, inexperience, ignorance, as well as preconceived opinions, operate wonderfully to blind the judgment and seduce the understanding." * *

"A lucky hit, or a strong figure, has not unfrequently overturned the best-reasoned plan. Thus, Dr. Franklin's remark, that a legislature with two branches, was a waggon drawn by a horse before and a horse behind, in opposite directions, is understood to have been decisive in inducing

* § 535. † § 537.

Pennsylvania, in her original constitution, to invest all the legislative power in a single body. In her present constitution that error has been fortunately corrected."*

But such appeals to the people, whether frequent or at distant intervals, would be ineffectual, inasmuch as, "the tendency of republican governments being to the aggrandisement of the legislature at the expense of the other departments," and the members of the legislature being numerous and influential, dwelling among the people, and connected with them by various ties of confidence and interest, the latter would plead their cause before the people at a great advantage, as compared with the judiciary or the executive, whose rights they may have invaded, and could scarcely fail to be sustained by the public voice. He concludes that the only effectual barrier against the inroads of the legislature upon the other departments of the Government, is to be looked for "in some contrivances in the interior structure of the Government itself," whereby "the constitutional independence of

* § 537.

each may be fully provided for." * * * * "Each should have its independence secured beyond the power of being taken away by either, or by both the others," by such a "partial participation of each in the powers of the other," and such a system "of checks and balances," as we in England happily possess in our own Constitution, and which that of the United States has sought to follow as far as circumstances permitted.

The independence of the judicial department, "which must always be the weakest," can only be preserved, Mr. Justice Story rightly insists, by the legislature abstaining from exercising any power over the salaries of the judges, when they have been once appointed by the executive. This forbearance has been departed from in many of the individual States. Not only, as before-mentioned, have the salaries of the judges been, in many instances, made subject to the annual vote of the legislature, but in others the judges themselves are appointed, not by the executive, but by the electors, and for short periods of years.

In anticipation of the possibility of some future attack upon the independence of the judges of the Supreme Court of the United States, who are appointed by the Constitution as its defenders in the last resort, Mr. Justice Story urges very forcibly the necessity of those "additional guards," which can alone "protect this department from the absolute dominion of the others." Yet, he adds, "rarely have these guards been applied; and every attempt to introduce them has been resisted with a pertinacity which demonstrates how slow popular leaders are to introduce checks upon their own power; and how slow the people are to believe that the judiciary is the real bulwark of their liberties."*

* § 540.

CHAPTER VII.

THE SENATE.

THE policy of dividing the legislature into two distinct branches, is one upon which there can be no difference of opinion among well-informed persons, either in this country or in the United States, in the present day. It was not so, however, in the latter country, at the time of the Revolution; and the question of the propriety of establishing a second legislative chamber, there termed the Senate, was not determined without a careful review of all the arguments in support of such a measure.

A very brief recapitulation of them is necessary, as an introduction to what follows on the subject of the Senate itself.

The value of an Upper House or Senate was insisted on "as a security against hasty,

rash, and dangerous legislation; allowing "errors and mistakes to be corrected, before they have produced public mischief."* The second chamber "being organised upon different principles, and actuated by different motives," will operate as "a preventive against attempts to carry into effect private, personal, or party objects, not connected with the common good." It secures "an independent review" of measures that are to act upon the whole community, and which may affect interests "of vast difficulty and complexity," and therefore "require nice adjustments and comprehensive enactments." It is of great importance that such proposed Acts of legislation should be reviewed by different minds, "acting under different and sometimes opposite opinions and feelings."

"Whatever, therefore, naturally and necessarily awakens doubt, solicits caution, attracts inquiry, or stimulates vigilance and industry, is of value to aid us against precipitancy in framing or altering laws, as well as against yielding to the suggestions of indolence, the selfish projects of ambition, or the cunning devices of corrupt and hollow demagogues."†.

* Story, § 555. † § 557.

In the next place, there can scarcely be any other adequate security against encroachments upon the constitutional rights and liberties of the people. Algernon Sidney has said "that all governments have a tendency to arbitrary power, but those that are well constituted place this power so as it may be beneficial to the people, and set such rules as are hardly to be transgressed."* The legislative power derives this constant tendency to overleap its proper boundaries, from passion, from ambition, from inadvertence, from the prevalence of faction, or from the overwhelming influence of private interests. Under such circumstances, the only effectual barrier against oppression, accidental or intentional, is to separate its operations, to balance interest against interest, ambition against ambition, the opinions and sympathies of one body against the opinions and sympathies of the other. "And it is obvious," says Mr. Justice Story, "that the more various the elements which enter into the actual composition of each body, the greater the security will be."†

* Discourse on Government, c. 3. § 45. † § 558.

It will be observed that the policy of making an Upper House, or Senate, a part of the Constitution of the United States, is justified by precisely the same arguments that are used in this country in favour of the existence of the House of Lords as an integral part of our Constitution. And the learned commentator's argument, "that the more various the elements that enter into the composition of each body, the greater the security will be," is much more applicable to our two Houses of Parliament than to the Senate and House of Representatives of the United States.

The propriety of having an Upper House having been determined upon, the following more detailed reasons, stated as having influenced the framers of the Constitution in giving to the Senate its actual structure, place in a stronger light the efforts made by them to assimilate that body to the House of Lords, in its character and functions, to as great an extent as was compatible with institutions from which the hereditary principle was excluded.

In the first place, as a basis for the argument on which its present structure rests, it is to be assumed as granted that a second branch or Upper House of legislature will be "a salutary check" upon the Lower. And as this check will be effectual "in proportion to the dissimilarity in the genius of the two bodies, it must be politic to distinguish them by every circumstance" consistent with the principles on which the Government is founded.*

Secondly, the necessity of a Senate being indicated "by the propensity of all single and numerous assemblies to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious resolutions," examples of which "might be cited without number from proceedings in the United States, as well as from the history of other nations," it was essential "that a body to correct that infirmity should be less numerous, and should possess a due degree of firmness, and a proper tenure of office."†

* § 562. † § 563.

Thirdly, "another defect to be supplied by a Senate, was the want of a due acquaintance" with the objects and principles of legislation, which was often manifested by the Lower Houses of the American legislatures; leading to the adoption of unwise and ill-considered measures which frequently required to be repealed, explained, or amended.*

Fourthly, "such a body would prevent too great a mutability in the public councils, arising from a rapid succession of new members." "Such instability has a tendency to diminish respect and confidence," "to damp the ardour of enterprise, to diminish the security of property, and to impair the reverence and attachment which are indispensable to the permanence of every political institution."†

Fifthly, a Senate would be greatly instrumental "in keeping alive a due sense of national character," by a scrupulous and uniform adherence to just principles, "which it is difficult to impress upon a single body that is numerous and changeable."‡

Sixthly, a Senate will more effectually main-

* § 564. † § 565. ‡ § 566.

tain "the due responsibility in the Government," which is apt to be endangered by the frequency of the elections of the Lower House. The members of the Senate being less liable to change, will feel a greater degree of personal responsibility, and contribute to keep up the connected chain of legislation which is essential to the public welfare.*

Lastly, "a Senate duly constituted would not only operate as a salutary check upon the House of Representatives, but occasionally upon the people themselves, against their own temporary delusions and errors." In times of excitement, when the public may be "stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men," . . . "how salutary will be the interference of a body of respectable citizens, chosen without reference to the exciting cause, to check the misguided career of public opinion, and to suspend the blow, until reason, justice, and truth can regain their authority over the public mind."†

The Senate of the United States is composed

* § 567. † § 568.

of two senators from each State, chosen by the legislature thereof for six years (sect. 3 of the Constitution, clause 1); and by clause 2, one-third of the Senate is renewed every second year.

The fact of the senators being the representatives of the several States in their individual and independent capacities, is of importance, "in the great difference it creates in the elements of the two branches of the legislature, not unlike the different organisations of the House of Commons and the House of Lords in Great Britain."* The members of the House of Representatives of the United States are chosen in reference to population; those of the Senate "represent the voice, not of a district, but of a State,"† and a more enlarged view of the interests, not only of their own State, but of the whole Union of States, is expected of them. They will, therefore, be more likely to impose a salutary impediment to the multiplication of bad laws. They may, indeed, occasionally stop the progress of good

* § 704. † § 699.

ones. "But," says Mr. Justice Story, "a good law had better occasionally fail, rather than bad laws be multiplied with a heedless and mischievous frequency. Even reforms, to be safe, must, in general, be slow; and there can be little danger that public opinion will not sufficiently stimulate all public bodies to changes which are at once desirable and politic. All experience proves that the human mind is more eager and restless for changes than tranquil and satisfied with existing institutions."* . . . "And it has been demonstrated that the Senate, in its actual organisation, is well adapted to the exigencies of the nation; that it is a most important and valuable part of the system, and the real balance-wheel which adjusts and regulates its movements."†

The argument for the actual number of which the Senate is composed is stated to be, "that it is indispensable that it should consist of a number sufficiently large to ensure a sufficient variety of talents, experience, and practical skill, for the discharge of all their duties.

* § 701. † § 702.

The legislative power alone, for its enlightened and prudent exercise, requires no small share of patriotism, knowledge, and ability. In proportion to the extent and variety of the labours of legislation, there should be members who should share them, in order that there may be a punctual and perfect performance of them."* And a comparison between their number and that of the House of Lords, strengthens the conclusion that the number of members composing the Senate is neither too great nor too few for the adequate discharge of their duties.

The reasons for the duration of the term of the office of senator for six years were, "that a deep-felt responsibility is incompatible with great frequency of elections. Men can feel little interest in power which slips away almost as soon as it is grasped, and in measures which they can scarcely do more than begin, without hoping to perfect."† The arguments in favour of the duration of the legislative office generally "may be urged with increased

* § 706. † § 711.

force in regard to the Senate." It is observed that some of the wisest statesmen of America have not scrupled to assert that in some of their legislative assemblies there has been exhibited a marked deficiency in the knowledge of the means by which the real interests and welfare of a people are promoted. "It is utterly impossible for any assembly of men, called for the most part from the pursuits of private life, continued in employment for a short time, and led by no permanent motive to devote the intervals of public occupation to the study of the nature and operations of Government, to escape from the commission of many errors in the discharge of their legislative functions. In proportion to the extent and variety of those functions, to the national interests which they involve, and the national duties which they imply, ought to rise the intellectual qualifications and solid attainments of the members." A well-constituted Senate, therefore, "would be incalculably increased in value, by making its term of office such that, with moderate industry, talents, and devotion

to the public service, its members could scarcely fail of having the reasonable information which would guard them against gross errors, and enable them to resist visionary speculations and popular excitements,"* while it gave them the motives and the power to act upon their own convictions.

This argument for the duration of the office of senator is of peculiar force in the United States, where, according to Mr. Justice Story, "it is a known fact in the history of the individual States, that every new election (which now in most of the States takes place annually, in others every two years) changes nearly, if not quite, one-half of their representatives; and in the national Government, changes less frequent or less numerous can scarcely be expected. From this change of men there must unavoidably arise a change of opinions; and with this change of opinions a correspondent change of measures."† How much this must interfere with both public and private interests may be readily conceived, and is, in

* §§ 713, 714. † § 715.

point of fact, very often most inconveniently felt in the common transactions of business. This "instability of the public councils gives an unreasonable advantage" to all those persons in the community who are always ready to prey upon the wants of others, "and generates the worst passions of selfishness; and the worst spirit of gaming." It also "impairs the respect and confidence of foreign nations," and "exposes the whole policy of a State to be counteracted by the wiser and more stable policy of its rivals."*

A fear arose when the proposition to appoint the Senate for six years was about to be introduced into the Constitution, that by this duration of office "they would gradually acquire a dangerous pre-eminence, and eventually transform themselves into an aristocracy." To quiet such fears, though held by the best authorities of the time to be unfounded, the provision was added, that one-third of the seats should be vacated every two years, thus creating "a biennial appeal to the States," as regards one-

* § 716.

third of the number composing the Senate, "which must for ever prohibit any permanent combination for sinister purposes," without, it is thought, "impairing its efficiency for the discharge of its high functions." *

The legal qualifications of a senator are—that he must be thirty years of age, have been nine years a citizen of the United States, and be, when elected, an inhabitant of the State for which he is chosen.† On these points there is no need to remark further, than that the legal age for a representative being twenty-five ‡ (four years only beyond the age of legal qualification for a seat in the House of Commons), a member of the Senate of the United States may still, before the age of thirty, have acquired five years' experience in his legislative duties, if it had been his fortune to have been first elected a representative. Perhaps, also, reasons of prudence, in a country like the United States, where the ordinary education of youth ends much earlier than with us, may

* §§ 718. 724. † Section 3 of the Constitution, clause 3.
‡ Section 2, clause 2.

afford valid ground for deferring the age of admission into the legislature.

There are some other points regarding the Senate, which Mr. Justice Story discusses; but as they have no particular interest in reference to similar points in our own institutions, I pass them by. It will also be more convenient to defer any general remarks upon the Senate, until we are able to embrace in the same view both the Senate and the House of Representatives.

CHAPTER VIII.

THE HOUSE OF REPRESENTATIVES.

THE House of Representatives of the Union is composed of members "chosen every second year by the people of the several States."*

The principle of popular representation was, as we have seen, no new thing to the American people at the time of the Revolution. They had been nursed in liberty under the old colonial charters, and had been accustomed to the process of voting the taxes and controlling the supplies, after the manner of the British House of Commons. The mode of election only, was a subject of controversy at the period of framing the Constitution. Various arrangements were proposed and debated:

* Article 1, sect. 2.

election by the State legislatures; indirect election by delegates, &c.; but the only true mode, according to Burke, of securing the real responsibility of the representatives to the people, was adopted—that of direct election by the people themselves.

The right of the franchise, conferred by the State, ought unquestionably to raise, in the mind of every one invested with it, a sense of the responsibility it places him under, to exercise such right, according to the best of his judgment, for the purposes for which it was conferred upon him, namely, the public good. Thus considered, the possession of the franchise ought to elevate the feeling of personal dignity, strengthen the suggestions of duty, and furnish strong motives for mental cultivation and study, without which it is impossible to follow with intelligence the discussions on the great public measures of the day. It is without doubt a gratifying and a noble incident in the condition of a great State, that by the willing consent of the more instructed classes, and of those possessing, by means of

property, the greatest stake in the preservation of peace and good order and wise government, the franchise should be, by their act, through their representatives, distributed, without fear or apprehension, very widely among the mass of the community. But the extent to which this can be carried, with safety to all the complicated interests of the State, is and has ever been, by the best and greatest political authorities in ancient and modern times, argued as a question of expediency, to be determined by the discretion of the legal powers of the State for the time being. And as such, and not as a matter of abstract right, it is and has been determined by the legislation of the United States, as well as by that of the several States throughout the Union. Mr. Justice Story adopts and enforces this principle in the following words:—

"This fundamental principle of an immediate choice by the people, however important, would alone be insufficient for the public security, if the right of choice had not many auxiliary guards and accompaniments. It was indispensable to provide for the qualifications of the electors. It is obvious that, even when the principle is established,

that the popular branch of the legislature shall emanate directly from the people, there still remains a very serious question, by whom and in what manner the choice shall be made."*

This question, he adds, is sufficiently perplexing in theory; and when reduced to practice in different free States, has been much varied, according to the different "manners, habits, institutions, characters, and pursuits" of the people; "the local position of the territory, in regard to other nations; the actual organisation and classes of society; the influences of peculiar religious, civil, or political institutions;" . . "the national temperament;" . . . "the degrees of knowledge or ignorance pervading the mass of society."†

"The most strenuous advocate for universal suffrage has never yet contended, that the right should be absolutely universal. No one has ever been sufficiently visionary to hold that all persons, of every age, degree, or character, should be entitled to vote in all elections of all public officers. Idiots, infants, minors, and persons insane or utterly imbecile, have been, without scruple, denied the right, as not having the sound judgment and discretion fit for its exercise. In many countries, persons

* § 577. † § 578.

guilty of crimes have also been denied the right, as a personal punishment, or as a security to society. In most countries, females, whether married or single, have been purposely excluded from voting, as interfering with sound policy, and the harmony of social life. In the few cases in which they have been permitted to vote, experience has not justified the conclusion, that it has been attended with any correspondent advantages, either to the public or to themselves. And yet it would be extremely difficult, upon any mere theoretical reasoning, to establish any satisfactory principle upon which the one-half of every society has thus been systematically excluded by the other half from all right of participating in government, which would not, at the same time, apply to and justify many other exclusions."*

If, according to the ultra-democratic theory, "all men are born free and equal—if, because all have common rights and interests to protect, all have therefore a natural, equal, and inalienable right to vote, and to decide, by themselves or by their representatives, upon the laws and regulations that are to control and sustain such rights," what is there in that argument that does not as much apply to females "as free, intelligent, moral, and responsible beings, . . . having a vital stake in all the

* § 579.

laws and regulations of society," or to minors, who, by the law of England, attain their majority at the age of twenty-one; by the law of France, at one time, at the age of thirty; by the law of Naples, at eighteen; and by the law of Holland at twenty-five?* "Who shall say that one man is not as well qualified as a voter at eighteen, as another at twenty-five, or a third at forty, and far better than most men at eighty?"†

It is almost superfluous to advert to the assumption on which the ultra-democratic theory rests, "that all men are born free and equal;" its unsoundness has been long since fully exposed by the discussions to which it gave rise at the time of the French Revolution. Men are born into society, and find, from the moment that they become responsible agents, that their natural liberty, even in the freest States, has been placed under certain limitations, long before they were born, by that society, and for the good of its members

* Blackstone's Commentaries, §§ 463, 464.

† Story, § 579.

as a whole. And if their natural liberty has been in one case justly restrained by laws expressing the mature and enlightened opinion of the governing body of society—as by all those laws which prevent a man from using his natural liberty to the injury of his neighbour—why should it not be restrained with equal justice in another—as that no man should participate in the governing power, until the mature and enlightened opinion of the governing body of society is satisfied that he is capable of using that power with intelligence, and for the benefit of society? Again, with respect to the ultra-democratic notions of equality, it has been abundantly shown that it is perfectly untrue in fact, that all men are born equal, either in natural gifts and abilities, or in the eye of society, even the most savage. To equality before the law—that first sentiment of natural justice—every individual is entitled, of whatever age or sex, or of whatever condition—mental, physical, or social. This just feeling and principle of equality before the

law, has, by a confusion of ideas, been extended to convey the meaning of a natural and social equality, neither of which ever existed among men. In the same manner, the idea that there is such a thing as an abstract right to vote, is traceable to the habit of using the word "right" in a too general sense. The imperfection of language leads to the use of the same word to express a natural right as to express a civil right. The latter is a mere creation of the law for the time being—a civil ordinance, which may or may not be just or equitable, expedient or otherwise; which, as regards the franchise, may involve the questions of whether the age at which a minor shall attain his majority shall be twenty-one, eighteen, or twenty-five, and whether it is for the general good that this or that qualification should be required of a man before the power of voting is conceded to him; and when these questions are determined by the law of the State, the individual is invested with a right in accordance with that law. The former —a natural right—is one which the universal

sense of mankind in a state of civil society deems such: as the right to justice, to protection against injury, and which may be claimed by any inhabitant of a free country, whether male or female, sane or insane, minor or of full age, or even a criminal.

Mr. Justice Story proceeds to say:—

"The truth seems to be, that the right of voting, like many other rights, is one which, whether it has a fixed foundation in natural law or not, has always been treated in the practice of nations, as a strictly civil right, derived from and regulated by each society according to its own circumstances and interests." * * *

"If every well-organised society has the right to consult for the common good of the whole, and if, upon the principles of natural law, this right is conceded by the very union of society, it seems difficult to assign any limit to this right, which is compatible with the due attainment of the end proposed. If, therefore, any society shall deem the common good and interests of the whole society best promoted, under the particular circumstances in which it is placed, by a restriction of the right of suffrage, it is not easy to state any solid ground of objection to its exercise of such an authority."*

He then goes on to show that every State in the Union has acted upon this principle;

* § 580.

that "in the adoption of no State constitution has the assent been asked of any but the qualified voters;" and who shall be the qualified voters has been, and is continually being settled and altered by themselves, "no two States having fixed the qualifications of voters upon the same uniform basis." "From this," he adds, "will be seen how little, even in the most free of republican governments, any abstract right of suffrage, or any original indefeasible privilege, has been recognised in practice."*

If, therefore, there be any person in this country, of any pretensions to fair reasoning or competent information, who is still prepared to maintain that the franchise is anything more than a trust, placed by the legislative authority of the State, for the time being, in the hands of those who, in the judgment of that authority, will not abuse it, but will use it for the promotion of the common good, he must have recourse to the example of some country whose practice has gone beyond that

* § 581.

of "the most free of republican governments," the several States of the American Union—if such there be—and to arguments which those republican governments do not recognise.

The fact has been, that in free States this privilege of the franchise has been intrusted to a greater or less number, "without any State being able to assert that its own mode is exclusively founded in natural justice, or is most conformable to sound policy, or is best adapted to the public security." * * It is entirely a question of local and temporary discretion; for "what may best promote the public weal and secure public liberty in one age or nation, may totally fail of similar results under local, physical, or moral predicaments essentially different."*

At the time of the framing of the Constitution of the United States, the differences in the manner in which the franchise was settled in the different States was remarkable. In Virginia, the exclusive right to vote was in the freeholders; in Rhode Island and Con-

* § 581.

necticut, in the freemen; in Massachusetts, in persons possessing a given amount of personal property; in other States, in persons paying taxes, or having a fixed residence. The question was much debated by the convention which drew up the Constitution, whether it would not be more fair and equal, and more likely to insure a direct and immediate representation of the popular opinion, if a uniform qualification for voting were adopted for the House of Representatives. It was, however, unanimously decided otherwise, and upon grounds precisely similar to those which are held to justify and recommend the very great diversity of qualifications for the elective franchise that has so long existed in this country. On this point Mr. Justice Story's reasoning is as follows:—

"It might be urged that it is far from being clear, upon reasoning or experience, that uniformity in the composition of a representative body is either desirable or expedient, founded in sounder policy, or more promotive of the general good, than a mixed system, embracing and representing, and combining, distinct interests, classes, and opinions. In England, the House of Commons, as a representative

body, is founded upon no uniform principle, either of numbers, or classes, or places. * * And in every system of reform which has found public favour in that country, many of these diversities have been embodied from choice, as important checks upon undue legislation, as facilitating the representation of different interests and different opinions, and as thus securing, by a well-balanced and intelligent representation of all the various classes of society, a permanent protection of the public liberties of the people, and a firm security of the private rights of persons and property."*

Accordingly, the diversities of franchise in each State were adopted as the basis of the elections for the representatives of the Union; the electors "of the most numerous branch of the State legislature" being fixed upon as those to be invested with the franchise for the election of the members of the House of Representatives.

The length of time for which the members of the House of Representatives should be elected was not settled by the framers of the Constitution without considerable differences of opinion. They had before them the varied examples in their own country, of Virginia,

* § 585.

electing its representatives for seven years, North and South Carolina for two years, Connecticut and Rhode Island for six months, and the other States for a year. Abstract maxims and theoretical arguments had great influence in creating a preference for annual elections. The resolution ultimately adopted was, that the members of the House of Representatives should be elected for two years. Whether or not this was a wise decision, may be gathered from the views which Mr. Justice Story does not hesitate to place before his countrymen, with his usual fairness and honesty. His proposition is, that—

"The aim of every political Constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue the common good of society; and, in the next place, to take the most effectual precautions for keeping them virtuous, while they continue in their public trust."*

The latter object may to some extent be attained by frequency of elections. But how frequent they ought to be is clearly a matter for the exercise of a wise discretion. For it is

* § 589.

equally clear that too great frequency of elections would completely defeat the first-named object.

The reasons urged by Mr. Justice Story against too great frequency of elections are many and various. If they interfere too much with the pursuits of the people, they will give rise to a general indifference and inattention to elections. If they produce frequent changes in the public councils, they will introduce imbecility, irresolution, and the want of due information in those councils.

"Men, to act with vigour and effect, must have time to mature measures, and judgment and experience as to the best method of applying them. They must not be hurried on to their conclusions by the passions or the fears of the multitude."* "The very frequency of elections has a tendency to create agitation and dissensions in the public mind, to nourish factions and encourage restlessness, to favour rash innovations in domestic legislation and public policy, and to produce violent and sudden changes in the administration of public affairs, founded upon temporary excitements and prejudices."† "It operates also as a great discouragement upon suitable candidates offering themselves for the public service. They can have little

* § 592. † § 593.

opportunity to establish a solid reputation as statesmen and patriots, when their schemes are liable to be suddenly broken in upon by demagogues, who may create injurious suspicions, and even displace them from office before their measures are fairly tried. And they are apt to grow weary of continued appeals to vindicate their character and conduct at the polls, since success, however triumphant, is of such short duration, and confidence is so easily loosened." * "It is not enough that a member comes to the task with an upright intention and sound judgment, but he must have a competent degree of knowledge of all the subjects on which he is called to legislate; and he must have skill as to the best mode of applying it. The latter can scarcely be acquired but by long experience and training in the national councils. The period of service ought therefore to bear some proportion to the variety of knowledge and practical skill which the duties of the station demand." †

Every measure that comes before the legislature is to be discussed with reference to the rights, interests, and pursuits of the whole people.

"Large and enlightened views, comprehensive information, and a just attention to local peculiarities, products, and employments, are indispensable qualifications" for a useful member of the legislative body. "Yet it is obvious, that if very short periods of service are allowed

* § 602. † § 603.

to members, the continual fluctuations in the public councils, and the perpetual changes of members, will be very unfavourable to the acquirement of the proper knowledge, and the due application of it for the public welfare. One set of men will have just mastered the necessary information, when it will be succeeded by a second set, who are to go over the same grounds, and then are to be succeeded by a third. So that inexperience, instead of practical wisdom, hasty legislation, instead of sober deliberation, and imperfect projects, instead of well-constructed systems, would characterise the national government."*

These and other considerations of obvious weight and importance, as affecting the chances of a country getting its best informed and most experienced and most trust-worthy men to serve it, are brought together by Mr. Justice Story with much care and in much detail, and lead directly to the conclusion, which indeed he does not take the trouble to disguise, that the election of members for the House of Representatives of the United States for two years only, is not well calculated to fulfil the conditions which he lays down as those under which a country is most likely "to obtain for rulers men who possess most wisdom to dis-

* § 604.

cern, and most virtue to pursue, the common good of society." He thinks the decision, by which the period of two years was adopted instead of one, both politic and wise;* but the whole scope of his argument, and his remark that, since the great increase in territory and population of the United States of late years, "a far more exact and comprehensive knowledge is now necessary to preserve the adjustments of the Government, and to carry on its daily operations, than was required, or even dreamed of, at its first institution,"† prove that, in his opinion, a longer duration of the term for which the members of the House of Representatives are elected, would conduce more to the general interests of his country.

The inferior position which, both in the public estimation and in actual power, the House of Representatives holds in the system of the United States Government, as compared with the Senate, will be adverted to hereafter.

The questions relating to the qualifications

* § 611. † § 605.

for members of the House of Representatives, —their age, religious opinions, and citizenship, may be passed by, as not being likely to be regarded as very applicable to any of the matters of controversy in this country.

The apportionment of the representatives among the States was, by the Constitution, fixed at one for every 30,000 inhabitants; each State to have at least one representative; and an arrangement was introduced applicable to the slave-holding States, declaring that the number in those should "be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons."

Much difference of opinion existed at the time upon the question of how the apportionment ought to be made. One principle, much urged, tended to preserve an exact equality of power between all the States, as under the Confederation. Another aimed at making property the basis of representation. The maxim under which this view was sought to be

established was, "That taxation and representation should go hand in hand." This had been a favourite theory with the American people;* but it was understood in a sense very different from that which has been usually assigned to it by the democratic school of more recent times. In America it meant "that representation should be in proportion to property."† Accordingly, it was argued that this principle "might commend itself to some persons, because it would introduce a salutary check into the legislature in regard to taxation, by securing, in some measure, an equalisation of the public burdens, by the voice of those who were called to give most towards the common contributions."‡ This is a totally different result of the above maxim, from that drawn from it by the modern school of democracy, namely, "that every man who pays taxes should have a vote;" or, "that it is unjust that a man should be taxed without also being represented." These are only other forms of the assumption, that the franchise to be just

* § 632. † § 632. ‡ § 632.

should be universal; and are equally open to the question of what meaning is to be attached to the term "universal:" whether or not it is to include females; and whether or not the man of twenty years of age, who is taxed as much as the man of twenty-one, is to be excluded, as well as the one of nineteen or eighteen.

The basis on which the representation, as regards numbers and property, was finally fixed, was, "that representation and direct taxes should be apportioned in the same ratio."* Thus it was not confined to "either persons or property, numbers or wealth," but it is an admixture of all; similar, therefore, to a certain extent, in intention, to our own, and designed, like our own, "by apportioning influence among each," to introduce and to perpetuate "vigilance, caution, and mutual checks."†

The new apportionments, to adjust the representation to the increase of the population, take place every ten years. The results

* § 632. † § 633.

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have been remarkable. In 1790 the population of the United States was about 3,929,000; in 1830 it was about 12,866,000; in 1840 it was 17,063,353; and in 1850, 23,191,074.

The numbers composing the House of Representatives were originally sixty-five; they have, by the Act of July, 1852, been increased to 234; and the proportion of representatives to population has been raised first, in 1792, to one for every 33,000 of the population: next, in 1811, to one for every 35,000; then, in 1832, to one for every 47,700; by the Act of June 25, 1842, to one for every 70,680; and by the Act of 1850, to one for every 93,420.

The particular mode by which this distribution is arrived at, and the fractional numbers dealt with in apportioning representatives and direct taxation, though matters at one time of much controversy in the United States, need not occupy our attention. Neither need we be detained by the few other points adverted to under this head.

One or two additional remarks only are necessary in order to record Mr. Justice Story's

views as to the mental qualifications and attainments expected of a member of the House of Representatives. He says that "Information of peculiar local interests is of less value and importance in a member of the House of Representatives than in that of a member of a State legislature. The knowledge required of a national representative is necessarily of a more large and comprehensive character."* . . . "Few members, comparatively speaking, will be found ignorant of local interests; but time, diligence, and a rare union of sagacity and public spirit, are indispensable to avoid egregious errors in national measures."† . . . "The very devotion to local views, feelings, and interests, which naturally tends to a narrow and selfish policy, may be a just disqualification and reproach to a member of Congress. A liberal and enlightened policy, a knowledge of national rights, duties, and interests, a familiarity with foreign governments and diplomatic history, and a wide survey of the operations of commerce, agricul-

* § 659. † § 660.

ture, and manufactures, seem indispensable to a lofty discharge of his functions." * Reference is then made to the frequent habit in Great Britain, "of selecting men for representatives of large and populous cities and districts, who do not reside therein, and cannot be presumed to be intimately acquainted with their local interests and feelings. The choice, however, is made from high motives, a regard to talents, public services, and political sagacity." † An opportunity occurs, after a few pages upon another branch of the subject, of touching upon the question as to whether large or small electoral districts afforded the best prospect of obtaining for the service of the State the best and most highly-qualified class of representatives; and the opinion of Mr. Ames is quoted, from a speech delivered by him in Congress in 1789, in favour of the former, "because small districts may be conducted by intrigue; but in large districts nothing but real dignity of character can secure an election." The theory of 1789 can-

* § 659. † § 661.

not, in Mr. Justice Story's opinion, look for support in the facts of the succeeding fifty years. "Unfortunately," he says, "the experience of the United States has not justified the belief that large districts will always choose men of the greatest wisdom, abilities, and real dignity." *

* § 675, note.

CHAPTER IX.

ELECTIONS.

THE times, places, and manner of holding elections for senators and representatives is, by the first clause of the fourth section of the first article of the Constitution, left to the State legislatures.

"The manner is various; and perhaps the power has been exerted, in some instances, under the influence of local or party feelings, to an extent which is indefensible in principle and policy. There is no uniformity in the choice, or in the mode of election. In some States the representatives are chosen by a general ticket for the whole State; in others they are chosen singly in districts; in others they are chosen in districts composed of a population sufficient to elect two or three representatives; and in others the districts are sometimes single, and sometimes united in the choice. In some States the candidate must have a majority of all the votes to entitle him to be deemed elected; in others (as it is in England), it is sufficient if he has a plurality of votes. In some of the States the choice is by the voters *vivâ voce* (as it is in England); in others it is by the ballot."*

* § 826. Tucker's Blackstone's Commentaries, vol. i., App. 192.

These irregularities have, according to Mr. Justice Story, been productive of evils and "some inconveniences to the public service."* He, however, abstains from going into details, and merely adds that the existing system is maintained by the public opinion.

Far greater, however, than any of the inconveniences which Mr. Justice Story does, in a few words, touch upon, such as the occasional fact of a district, or even a whole State, being deprived of its vote at Congress by reason of the time of its holding its elections, is the evil which has been steadily gaining ground, of the whole machinery of the elections gradually falling into the hands of persons who devote themselves to the occupation of arranging them, of fixing upon and bringing forward the candidates, of creating for them a name and character by means of unceasing eulogies in the public press, of dictating to them their policy, of describing in its most minute details the course which it is expected of them that they will take on all the leading questions be-

* § 826.

fore the public, whether of internal or external interest, and finally, when the elections have terminated in success, looking for their reward from the various sources within the means of the predominant political party, should their candidate happen to belong to it.

It cannot be doubted that this system is one of the results of the great frequency of elections. Persons of fixed and steady occupations, who compose nearly the whole community among a people so occupied with commerce and industry in its various forms as the people of the United States, may occasionally, under the pressure or excitement of some important question, give up their time and attention to the details of political contests; but in a country where the suffrage is so extended; where, except in the cities, the population is scattered over wide surfaces, dwelling in small villages distant from each other, or in insulated farms, with often very imperfect means of communication, along half-formed roads, it cannot be a matter of surprise that such persons should, in the ordinary course of things, leave the field of politi-

cal agitation, and the difficulties and turmoils of election contests, open to those, who make it a matter of business, and can therefore devote to it the principal part of their time. This process, however, is manifestly not the one most calculated to bring forward for the service of the State, candidates who come up to the standard which Mr. Justice Story has, with a high sense of its truth and importance, held up before his countrymen.

I do not wish to imply that no such traffickers in political agitation, or in the "working of elections" exist among ourselves. Far from it. But as no human system is perfect, so neither has that of the United States escaped an evil incident to the peculiar political organisation it has chosen; and therefore we may feel assured that we should not escape it in a similarly aggravated degree, under a franchise unduly extended, and a greater frequency of elections.

But, if possible, a still greater and more grave departure from the theory of the Consti-

tution, as it existed in the eyes and expectations of its careful and prudent founders, has taken place in the gradual lowering throughout nearly all the States of the Union, and the entire abandonment in two-thirds of them, of those qualifications for the exercise of the franchise which existed when the Constitution was adopted. These qualifications have been already described,* and have been seen to have been founded on property, on residence, on the payment of taxes, varying in degree in the different States, but all resting on one or the other requirement, as an essential principle of stability: their very variety being justified, as affording "checks upon undue legislation," and as tending to protect individual interests without sacrificing the general good; and defended by the example of their utility in helping to produce and to maintain a system of fair and equal liberty, such as we happily enjoy in this country.

It will be remembered that, by clause 1 of the

* Page 91.

3rd section of the Constitution, the senators of the United States are to be elected by the legislatures of the individual States; and by section 2 of the first article, the members of the House of Representatives of the United States are to be elected by the electors of the most numerous branch of the State legislatures; in other words, by the electors of the House of Representatives of each State.

The condition of the franchise, therefore, in the individual States, has a most direct bearing upon the elections for the senators and representatives of the United States.*

What this franchise has gradually become is, accordingly, a matter of the first importance in reference to the United States' Constitution, and to the question whether it continues in theory and in fact what it was at the time of its formation sixty-five years ago.

To exhibit this point I will avail myself of

* The individual States are divided into electoral districts; the smaller elect the members of the House of Representatives of the State, the larger the Senate. The franchise is, with, I believe, only one exception (that of North Carolina), the same for both.

the authority of Mr. Justice Kent, whose "Commentaries on the American Constitution," published in 1844, are held in equal estimation with those of Mr. Justice Story, and both are fully entitled to a place beside those of Blackstone, wherever the English language is spoken.

At pp. 227–229, vol. i., of his learned work, Mr. Justice Kent thus expresses himself:—

"The progress and impulse of popular opinion is rapidly destroying every constitutional check, every conservative element, intended by the sages who framed the earliest American constitutions, as safeguards against the abuses of popular suffrage.

"Thus, in *Massachusetts*, by the Constitution of 1780, a defined portion of real or personal property was requisite in an elector;—that qualification was dispensed with by the amended Constitution of 1821.

"By the practice under the Charters of *Rhode Island* and *Connecticut*, a property qualification was requisite to constitute freemen and voters. This test is continued in Rhode Island, but done away with in Connecticut by their Constitution of 1818.

"The *New York* Constitution of 1777 required the electors of the Senate to be freeholders, and of the Assembly to be either freeholders, or to have a rented tenement of the yearly value of forty shillings. The amended Constitution of 1821 reduced this qualification down to pay-

ment of a tax, or performance of militia duty, or assessment and work on the highways. But the Constitution as again amended in 1826, swept away all these impediments to universal suffrage.

"In *Maryland*, by their Constitution of 1776, electors were to be freeholders, or possessing property to the amount of 30*l.*; but by legislative amendments in 1801 and 1809 (and amendments are allowed to be made in that State by an ordinary statute, if confirmed by the next succeeding legislature) all property qualification was disregarded.

"The Constitution of *Virginia*, in 1776, required the electors to be freeholders, but the Constitution of 1830 reduced down the property qualification to that of being the owner of a leasehold estate or a householder.

"In *Mississippi*, by the Constitution of 1817, electors were to have been enrolled in the militia, or paid taxes: but those impediments to universal suffrage were removed by the new Constitution of 1833.

"So the freehold qualification, requisite in certain cases by the Constitution of *Tennessee* of 1796, is entirely discontinued by the Constitution of 1835.

"All the State constitutions formed since 1800 have omitted to require any property qualifications in an elector, except what may be implied in the requisition of having paid a State or county tax, and even that is not in the constitutions more recently formed or amended, except in the *Rhode Island* Constitution of 1843. * * *

"Such a rapid course of destruction of the former constitutional checks is matter for grave reflection; and to counteract the dangerous tendency of such combined forces as universal suffrage, frequent elections, all offices for

short periods, all officers elective, and an unchecked press; and to prevent them from racking and destroying our political machines, the people must have a larger share than usual of that wisdom which is 'first pure, then peaceable, gentle, and easy to be entreated.'"

The actual state of the suffrage in those States where the right of suffrage is exercised without any qualification whatever, is thus described:—

"In the States of Maine, Vermont, New York, Maryland, South Carolina, Kentucky, Indiana, Illinois,* Michigan, Missouri, Mississippi, Tennessee, Arkansas, and Alabama, no property qualification whatever, not even paying taxes or serving in the militia, is requisite for the exercise of the right of suffrage. Every free male white citizen of the age of twenty-one years, and who shall have been a resident for some short given period, varying in those States from two years to three months, is entitled to vote."

To this enumeration the following States are now to be added:—Florida, Texas, Wisconsin, Iowa, California; and finally the once aristocratic State of Virginia, which, on the 25th of October, 1851, adopted the same

* In Illinois, "*aliens*, being residents, are entitled to vote."

ultra-democratic form of constitution as the States above named, by a vote of 75,748 to 11,060 against it.

The following States have retained the semblance of a qualification :—

"In the States of New Hampshire, Massachusetts, Connecticut, Pennsylvania, Delaware, Georgia, Ohio, and Louisiana, the elector is required, in addition to age and residence, to have been assessed and paid, or, in Ohio, 'charged' with a State or county tax, or in Connecticut to have served in the militia."

In Rhode Island, North Carolina, and New Jersey, a qualification as to property is still requisite, but in the latter is rendered nugatory.

"The Rhode Island Charter of 1663 prescribed no regulation as to the right of suffrage." In 1724 an Act was passed limiting the franchise to those who possessed a freehold estate of a certain value, or was the eldest son of a freeholder. This requisite value was said to be 134 dollars. The new Constitution of 1843 has defined it to mean that sum clear of all encumbrances, and has required residence in the State of two years, and of six months in the city or town in which

the elector votes. But an elector having no property qualification is entitled to vote if he has resided during the six months preceding the election, and been registered in the previous year, and has also paid a tax of one dollar, or been enrolled and served in the militia. Naturalised citizens must have the freehold qualification above required; and no person can vote to impose a tax or expend money in any city or town unless he shall have paid a tax within the year preceding, upon property valued at 134 dollars.

* * * "These provisions, together with that relating to the judicial tenure and compensation, render the aspect of the constitution of that State more wise and conservative than any other State constitution recently framed or amended. Indeed, that constitution seems to stand pre-eminent in value over any of the existing State constitutions in the guards it introduces against one of the most alarming evils incident in large towns and cities to our democratical establishments—I mean the fraudulent abuse of the right of suffrage."

In *North Carolina*, the electors of the Senate must be freeholders, and the electors of the House of Commons (the name is

still retained from the colonial period) must have paid public taxes.

In *New Jersey*, by the law of 1798, the electors must have a clear estate of 50*l.*, and have resided for a year in the country. "But the election law of 1839 has reduced this constitutional check down to worthlessness, for it declares, that every person who has been assessed and paid a State or county tax within two years preceding the election, is to be deemed worth 50*l.* 'clear estate in the State.'"

This almost entire destruction, in so short a period, of all those "constitutional checks and conservative elements" in the franchise of the individual States, which had been regarded by the framers of the Constitution as essential to genuine liberty, has entirely altered the basis on which those able men placed the Constitution, and on which they relied for its continuing to be what their prudence and wisdom left it.

In determining that the Senate of the United States should be elected by the State legislatures, they expected that those legislatures

would be composed, first, of a Senate returned by a class of electors representing the more stable elements of the community; and, secondly, of a House of Representatives resting on similar elements, namely, on the electoral qualifications of property, residence, and the payment of taxes.

The process of change in this short space of time has swept away these expectations; and the Senate of the United States is now elected by State legislatures, based on a franchise unrestricted by any of the above qualifications, except in the very few instances above noticed; and the members of the House of Representatives of the United States are returned by direct election, by voters having, in twenty of the States, no property qualification at all, and in nine next to none, the remaining two only having retained any valid qualification.

It will, I imagine, be readily granted that this great change in the basis of power cannot have taken place without impressing upon the Senate and House of Representatives of the United States a quality and direction to

a very considerable extent in accordance with it; and therefore much more directly amenable to popular impulses than the legislative body contemplated by the framers of the Constitution.

But the above great change is far from being the only proof of the progress of ultra-democratical opinions which the legislation of that country has afforded of late years. Among the most remarkable has been the adoption, in more than two-thirds of the States, of the practice of electing the Judges, by popular vote and for short periods only; thus striking at the root of their independence, and violating a principle which has ever been held to be among the first elements of freedom, and of protection to life and property. The fact has been already touched upon; the extent to which the practice has been carried will be noticed in its proper place.

It is a common answer in the United States, in reply to questions as to the prospects of sober and temperate government, and the preservation of the just and equal rights of all, that

the democratic influence is extending itself in other countries besides the United States, and that it has made itself much more felt in this country during the last fifty years than it had ever done before. There is, however, between the constitutional changes that have taken place in this country and those of the United States, this marked difference, that their changes are departures from the principles of their Constitution; ours have been in accordance with our constitutional principles, enlarging their scope so as to embrace a greater number of individuals, but preserving, with all the guards that cautious wisdom could devise, the principles themselves, as the best guarantees of freedom, of safe and satisfactory progress, of high civilisation, and national honour.

There is another subject which requires to be noticed under this head of the elections in the United States, namely, the mode of giving the votes, which, as has been seen (p. 106), is in some States appointed to be *vivâ voce*, in others by "ballot."

It is necessary to repeat that this word never means, in the United States, "secret ballot," unless in the instances, which are rare, when the word "secret" is expressly added to it.

In this country we invariably associate with the word "ballot," the mode of giving a secret vote by dropping a "ball" into a covered box, in the manner too well known to need to be described.

In the United States the word "ballot" has, in its general acceptation, nothing to do with the word "ball," but means "a piece of paper, with the names of the candidate or candidates written or printed upon it."

In the Southern and Western States generally the voting is entirely open, and usually *vivâ voce.*

At all elections in the other States, the friends of the different candidates stand round the voting places, with the written or printed voting papers (called tickets) in their hands, and as each voter approaches, he takes from the hands of one of the agents of the

candidate or candidates for whom he intends to vote, one of these lists, openly before all the world, and delivers it, folded or unfolded as the case may be, to the persons taking the poll.

The tickets are now universally, I believe, printed; and being printed upon coloured paper,—the colour or some distinguishing device indicating the party to which the candidates belong,—the very fact of presenting a paper thus coloured or marked, though it might be folded up, in itself at once shows which side the voter takes at the election.

It will be desirable to describe by a few short quotations from the laws of some of the principal States, the different arrangements in regard to this matter in each.

By chapter 42 of the Acts of Massachusetts (1839 to 1846), relating to the election of the governor, lieut.-governor, senators, and representatives of the Commonwealth, it is enacted—

"Section 5. That no vote shall be received by the officers presiding at any such election, or at any election

for select-men and town-clerk of any town, or for mayor, aldermen, or common council of any city, unless the same shall be presented for deposit in the ballot-box, *open* and *unfolded*; nor shall any such vote be so received until the name of the person offering the same shall have been found upon the list and checked by the presiding officers, or by some one appointed by them therefore."

I have described in a former volume* the change made in the law of Massachusetts in 1851, by which, instead of this manly mode of giving a vote by presenting the voting paper "open and unfolded," the secret ballot was attempted to be introduced into practice; and I mentioned the process of voting which I witnessed at Boston, under, though by no means in accordance with, the new law. I described also the indignant feeling exhibited at a meeting of upwards of 5000 of the electors of Boston and its vicinity, against the attempt to impose secrecy upon their votes; their utter repudiation of it, as unworthy of men who had a duty to perform to the State, and were neither afraid nor ashamed to

* Notes on Public Subjects, &c. Murray. 1852.

perform it openly; and their bold declaration, that the man who was either the one or the other, was neither worthy of having a vote, nor entitled to have one. Indeed, the idea of secrecy in the mere act of giving the vote, on the part of 5000 men who came together to a great public meeting to declare their sentiments, was altogether a contradiction and preposterous. Secrecy in the act of voting must, to be effectual as a protection to the voter, be accompanied with secrecy and silence, together with hypocrisy, on the subject of politics, for his whole life, which, if possible, would be contemptible, and which is plainly impossible in any country, much less a free one.

So strongly were these sentiments entertained by the electors of the Whig party in Massachusetts, that, on that party returning to power, the law relating to secrecy was altered in the spring of this year (1853), having been only carried originally by the democratic party by a very small majority, and under the stimulus of particular circumstances, which I have adverted to in the volume above-mentioned.

I am informed by a friend, who has the best means of knowing what was done, that the modification introduced into the law by the Whig party in the spring was the allowing the voter either to put his vote into an envelope, or to deposit it open, as before.

The question has since been brought before the "Convention," which has been lately assembled to discuss the revision of the Massachusetts' Constitution. The existence of such a Convention in a State like Massachusetts, where the population has been more fixed, and the ideas of republican government more sober, and with a greater leaning to the associations of the past, is probably the strongest proof that could be given of the progress of ultra-democracy in the United States. In this Convention, which assembled in May, 1853, the democratic party had a large majority; and into the projected amendments of the Constitution which they drew up, and which were submitted to the people in November, they re-introduced the proposition to require the votes to be en-

closed in envelopes. The proposed new Constitution was rejected, but by a narrow majority; the votes being (in round numbers), For, 62,000; Against, 67,000.*

The expression used in the election law of the State of Ohio, is another example of the ordinary meaning attached to the word "ballot."

By the 43rd chapter of the statutes of the State of Ohio, sec. 9,† it is enacted, "That each elector shall, in *full view*, deliver to one of the judges of the election, a single *ballot or piece of paper*, on which shall be written or printed the names of the persons voted for," &c., &c.

Nothing is said about folding the paper for the purposes of concealment, but in the next section "the judge of the election" is simply instructed to put the paper in the box "without inspecting the names written thereon."

Again, in the election law of the State of Maine (March, 1821), chap. 115, sec. 6, nothing

* November 15. A few votes not returned. † 1841.

is said about the votes being secret; but it is solely required of the "Select-men and Assessors presiding" at the election, that "they shall call on the voters in such meeting qualified for choosing such officers, requiring each of them to give in their votes on one list, for as many different persons as are then to be chosen;" and by section 9, no vote is to be received "unless delivered in writing by the voter in person." And by the Election Law of the same State for 1841, chap. 518, sec. 3, "the ballots for the election of Governors, Senators, Representatives, &c., are to be written or printed on clear white paper." * *

I will now give a couple of instances in which the law makes a show of requiring secrecy in the candidates voted for; but in a manner so vague and imperfect, as to prove that no value is attached to the provision.

By the revised statutes of Indiana (1843), chapter 5, art. 4, sec. 31, it is provided that "the ballot be a paper ticket which shall contain, written or printed, or partly written and partly printed, the names of the persons for

whom the elector intends to vote." * * And by section 32, "the inspector shall receive his ballot, and in the presence of the other judges put the same, without being opened or examined, into the ballot-box." * *

By the election law of the revised statutes of the State of New York (1845-6), chap. 6, sec. 7, "The electors shall vote by ballot; and each person offering to vote shall deliver his ballot, so folded as to conceal its contents, to one of the inspectors, in the presence of the board of inspectors."

Whatever show of concealment there may be in these provisions, and in similar ones in other States, the universal practice, as is very well known, is, that there is no concealment whatever, and that voters, in point of fact, no more attempt to disguise their inclinations in favour of particular candidates, or their votes, than they do in this country.

The following extract from a New York paper describes with so much particularity the actual process of elections in that city and State, and the manner in which the elections

are "worked," that it will be read with some interest. I should not insert it in these pages, did it not exactly correspond with the accounts given me of those scenes in that country, by persons on whose fairness and strict veracity I place the most implicit confidence. It amply confirms also what has been said above, as to the hands into which the elections have now fallen.

From the *New York Herald* of May 20th, 1852:—

"THE CORRUPTION OF THE PRIMARY ELECTIONS.

"The whig primary elections that have been carried on during the last week and the present, in this city, exhibit more than the ordinary amount of bribery, corruption, and fraud, of every description. The way in which the primary elections, both of whigs and democrats, have been managed for several years past in this city, is a subject of comment and complaint among all classes; but no remedy appears to have been thought of for the evil, and respectable citizens, instead of going to those elections, and taking such a part in them as would keep the rowdies and politicians in abeyance, have surrendered their rights into their hands, and for the most part have kept aloof from the contest, preferring to mind their own private business rather than be exposed to collision with bullies, in minding the business of the public, which is everybody's business

and nobody's. The result is, that corruption prevails to an alarming extent in these primary party elections, which rule and control the legal elections of the people—the nominees of the rum and rowdy delegates, no matter how unfit for office, carrying all before them, according to the usages of party, in voting for what they call "regular nominations," but which ought to be called irregular, disorderly, and mob nominations. For instance, look at the proceedings on Thursday last, in the nineteenth ward—voters carried to the ballot-box in scores of waggons, from various localities; and, in other wards, hundreds of democrats voting for Scott or for Fillmore—men ignorant and steeped in crime—picked up in all the purlieus of the city, and purchased at a dollar a head; and some, it is said, so low as fifty cents, to deposit in the ballot-box a vote they had never seen. This demoralising process is playing fearful havoc with our institutions, rendering them, to a vast extent, not only a nullity, but perverting them to mischief—to bad and corrupt legislation—and to the mal-administration of public justice. The judicious grieve at these results; but what can they do to arrest the progress of the evil?

"The following is a faithful and exact description of the system:—A lazy fellow, who hates to work for a living, and encouraged by the success of ward politicians, who have grown fat upon corruption and the spoils of office, devotes his energies, day and night, to the acquisition of influence in the ward in which he resides. He spouts—he brawls in the bar-room, and affects public virtue of the highest order. He is a patriot of the first water, and "a clever" fellow to boot. He treats the rowdies

whenever he meets them, and makes them his fast friends. He is most diligent in attending to all matters of public interest connected with the ward or the city. If he has sufficient ability, he draws up resolutions for public meetings and committees, and studies the forms and precedents of political organisations, so that he has them at his fingers' ends, and he is consulted as an oracle upon all occasions of doubt or difficulty, or importance. If there is an honest man in the ward of the same politics, who has any taste or ambition for public affairs, and especially if he shows any talent, he takes every opportunity to blast his character, and calls him a traitor, an intriguer, a demagogue, or some other hard name. For the simple and the confiding, he promises to obtain situations in the Post Office, the Custom House, and the Police. He thus gradually acquires the influence he seeks, and soon finds himself a far more important man in the ward than his neighbour, who is a man of real worth and respectability. His position is found out by those who want to use him. He is for sale to the highest bidder, either to defeat his own party by treachery, or to procure a nomination for any scoundrel who will pay for it. He has no politics of any kind. He has rascality to sell, and there are those who are willing to purchase it in order that they may traffic in it, and sell it themselves again, at a very high profit. For instance, the agents of Fillmore, or Scott, or Webster, come to one of these ward politicians, and they make a contract with him to secure the majority of the ward. Sometimes he succeeds completely, and sometimes only partially, as there are other politicians as cunning and as mercenary as himself, who manage to get their names on

the ticket, and, acting independently of him, must have their price, whatever it is, particularly if they find they can turn the scale, and hold the destiny of the ward or district in their hand. Hence it is that when the public imagine that a ward has gone for a particular candidate—gone for Fillmore, or Scott, or Webster—they are astonished to find that they were deceived, when the final result is declared, and it turns out to be the very reverse of what they had anticipated. The agents of the candidates see the purchasable delegates between the time of their election and the time that they elect the district delegate, or during that time—perhaps in the interval of taking a recess to "get a drink," or while leaving the room on some other emergency—and the matter is made "all right," and comes out to their satisfaction in the end, notwithstanding protracted ballotings, adjournments, and deceitful appearances of obstinacy.

"Nor is it always with money that the delegates are purchased—the promise of a fat office has sometimes an equally potent and magic effect. But it is most frequently with money that the operations are transacted, on the principle that 'a bird in the hand is worth two in the bush,' or that the men for sale have no faith in the promises or the success of the purchasing party. The sums of money thus given are incredible. We have heard of a case in one of the lower wards of the city, in which one man got, at the time of the late democratic district conventions, the enormous sum of two thousand dollars, out of which he said he bribed a majority of the delegates in the district, and kept the balance for himself.

"The dangers to which this system may lead are appall-

ing to every true patriot who calmly and attentively considers its tendency and possible results. * * *

"We do not say that any of these cases will ever be realised, but there is peril; and the facility with which corruption is practised in the ward and district nominations, show that it is not impossible on a larger scale, and where there would be actually fewer men to bribe. Every friend of these republican institutions, which were cemented by the best blood of our revolutionary ancestors, ought to lift his voice and use all his influence against this system, and strike at it where only it can be wounded effectually—in its first inception, in the ward primary elections. What are the remedies?

"In the first place, honest men ought to attend the primary elections, and not leave them in the hands of rowdies and scheming politicians; and they ought always to vote for the best men. In the second place, *there ought to be a registration established, by which no man could sail under false colours, or deposit a vote at a primary election, unless he belonged to the ward, and belonged to the party to which he professed to belong;* and the inspectors of the election ought to have the power to administer an oath to every voter, and perjury in such cases ought to be made as much a criminal offence as it would be in any legal proceeding. If this cannot be done, or, being done, does not check the evil, there is but one remedy remaining, and that is the stump nominations, or self-nominations, that prevail in the South and West. The primary elections, as carried on in this city, and in the North generally, may be for the convenience of party

and for the interest of politicians, but they are unknown to the Constitution; and when they threaten to subvert the very design of that Constitution, and to nullify our most cherished institutions, it is high time for the people to consider whether they ought not either to abolish them, or take them out of the hands of the wire-pullers into their own hands. They have the power, if they will only exert it; and to this complexion it will come at last. Meantime, our political system, so beautiful and so free, and so well adapted to guard against despotism on the one hand, and the licentiousness of the mob on the other, is so abused and so perverted from its original design, as to become the source of public demoralisation, the reproach of the United States, and the laughing-stock of the enemies of republican institutions all over the world."

It appears then, from the above, that one of the principal remedies against corruption, in a State whose revised statutes of 1845–6 nominally enact the secret ballot, is now considered to be *open voting!*

Neither can it be said that the above description applies to New York only. It is expressly stated in the above extract (p. 133), that the same system is carried on "in the North generally;" an assertion which, as a

general proposition, no one acquainted with the subject will dispute, although there may be localities which are exceptions.*

The stain of that disgraceful corruption which has been proved to exist in many of our smaller boroughs will, it is to be hoped, very soon be wiped from our constitutional system by the removal of some of the baser elements, and the addition to the constituencies of some that may be purer and better, and for which we have been sufficiently warned not (for the present, at least,) to look lower in the social scale. We may thus hope to continue to attain the great end of an elective system, namely, the finding the best men to govern the country.

The almost equally disgraceful practice of intimidation, once largely resorted to in the counties, has so much given way before the increased enlightenment and independence of

* It is said that a beginning has been made in some electoral districts in the State of New York to break through this system of managing the elections. It is heartily to be wished that it may become general, and that independence, property, high-mindedness, honour, cultivation, wisdom, and moral worth, will henceforward have more weight in the scale, as against mere numbers or those who use them.

the constituencies, that, as a general rule, they have no longer any need to raise the timid cry for the shelter of the ballot. The stigma of public reprobation is rapidly putting an end to the few lingering attempts at that species of oppression.

The only other points relative to the Houses of the Legislature of the United States which Mr. Justice Story touches upon, and which require a passing notice, are, that the time of their assembling is appointed for the first Monday in December in every year; and that, according to the fifth and sixth sections of the first article of the Constitution, it appears that the powers, rights, duties, and privileges of each House are in no important particulars different from those of our own Houses of Parliament.

CHAPTER X.

PAYMENT OF MEMBERS.

THE sixth section of the first article of the Constitution provides that "The Senators and Representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the United States' Treasury."

The arguments urged at the time of introducing this clause, referred to the ancient practice of England; the last known case of a Member of Parliament having received "wages" from his constituents being that of Andrew Marvell, M.P. for Hull, in the first Parliament after the Restoration. Mr. Justice Story also recapitulates the various reasons which seemed to justify the introduction of

the practice into the Legislature of the United States; but the inclination of his own opinion evidently is that the highest dignity, independence, and ability in the discharge of legislative functions can be more certainly obtained without pecuniary compensation than by means of it. He adverts to the fact that "the practice of England abundantly showed that compensation was not necessary to bring into public life the best talents and virtues of the nation."* And whatever may have been the presumed necessity or policy of such a practice in the infancy of the institutions of the United States, when their population was comparatively scanty, and the means of acquiring an honourable independence much more restricted—(although the numbers possessing the opportunities of high mental cultivation were, even then, not few)—the same considerations cannot now apply to an adult nation, teeming with wealth and overflowing with intelligence; and it appears to be not improbable, from the current of public discus-

* §§ 853. 855.

sion upon this, by far the most delicate and disagreeable subject to touch upon: in the whole range of their institutions, that the dissatisfaction openly expressed at the details, if not yet very openly directed against the principles of their present practice in this particular, will gather strength, and, before many years are passed, produce some important modifications of it.

The scale of payment to members has undergone various alterations. By an Act of 22nd of September, 1789, which continued in force to March, 1795, the payment was, to both senators and representatives, six dollars per working day, *i. e.* during their actual attendance on their legislative duties, and six dollars for every twenty miles travelled to and from the place of the meeting of Congress. In 1795 the payment to senators was raised to seven dollars; in March, 1796, it was again fixed at six dollars for both. In March, 1816, it was enacted that, "instead of the daily compensation now allowed by law, there shall be paid annually to the senators,

representatives, and delegates from territories, to the President of the Senate, *pro tempore*, and to the Speaker of the House of Representatives, 3000 dollars; and to each senator, member of the House of Representatives, and delegate, 1500 dollars." This Act was repealed on the 9th of February, 1817. It is now fixed, by the Act of the 22nd of January, 1821, at eight dollars a day to both senators and representatives, and eight dollars for every twenty miles travelled; and to the President of the Senate, *pro tempore*, (in case of there being no Vice-President of the Republic, who is *ex officio* President of the Senate,) eight dollars a day additional.

A proposition was last year brought before the Senate, by one of its committees, to change the mode of compensation from eight dollars per working day to 2000 dollars per year, without reference to the number of days that a member might be engaged in his legislative duties.

This, no doubt, would be a more dignified manner of assigning the stipend, and would

relieve members of both Houses from the imputations continually heaped upon them by the public press, that they wilfully prolong business for the sake of adding to the number of days for which they may claim their salaries. But the yearly amount proposed by that committee did not satisfy public opinion "out of doors." It was urged that the annual payments ought to be, for the President, 50,000 dollars a year (instead of 25,000 as at present); each cabinet minister 10,000 (instead of 6000); each senator, 6000; and each member of the House of Representatives, 5000. It was argued that, with so many means as now existed of making fortunes, by the application of ordinary talents and industry in any one of the various careers of life, it was not to be expected that men of the first qualifications would give themselves to the service of the republic for eight dollars per working day; that at the present rate of living, and considering the unavoidable expenses of a member of Congress at Washington and elsewhere, it was not probable that members in general would be satisfied with that sum.

Hence it has arisen—and it is a matter too notorious in the United States to make any reluctance necessary in referring to it here—that accusations without stint or measure are launched against a considerable proportion of the members of both Houses of Congress, to the effect that, in order to make up such incomes as will enable them to live in the manner they think requisite, they accept money payments from persons interested in questions before the Legislature, to give their especial attention to such questions.

It is not necessary to impute corrupt motives to the members who thus allow themselves to become paid agents for the prosecution of claims, or the advancement of measures upon which they have also to decide in their deliberative capacity, in order to show how completely their conduct is a descent from the high position which the theory of their Constitution and the expectations of its framers claimed for it. That it is a departure from the first principles of a representative and deliberative body, is too obvious to need any comment.

Neither, if corrupt motives are very freely imputed in the United States to such members (as is the well-known fact), do I desire to use that fact for the purpose of invidiously contrasting it with the general character of our own Legislature. Unhappily, the history of our railway legislation has left stigmas behind it which we should be glad to forget. And the circumstance that there always have been constituencies not very particular as to the moral qualities or the independence of the candidates of their choice, is sufficient to account for the degree of corruption that, in one form or another, is not unknown in the House of Commons. A marked distinction, however, between our system and that of the United States must not be forgotten, namely, that under their Constitution the frequency of elections, the very great diffusion of the franchise, and the payment of their members of both Houses, cause a class of men to be sent to the National Legislature, the majority of whom are not possessed of independent means sufficient to enable them to dispense with those

extraneous and unrecognised sources of emolument which are inconsistent with their position and character, should a low estimate of either happen to second the temptation; whereas, under ours, the vast preponderance among the members of the House of Commons of men of either hereditary or acquired wealth, or of competence honourably achieved and maintained, materially contributes to diffuse and preserve a high tone of feeling and of principle, which reduces the corrupt elements to exceptions; which is ever on the watch against their increase; and which despises and repels, though it may sometimes be obliged by political necessities to use them. And as regards the House of Lords, seldom indeed does even the voice of slander assail the honesty and independence of any one of its members. The extreme rarity —even during the moral contagion of the railway mania—of any instances in which members of that House were known to have made a discreditable use of their position for their own private advantage, was a proof of the

general soundness of a body whose soul is honour.

I might, from the materials in my possession, bring forward many facts in illustration and in proof, if need were, of the habit among members of Congress of receiving money for the transaction of business before the House, and for their support in favour of certain measures: I will confine myself to one or two, which sufficiently describe the process; and I will add an Act of Congress lately passed upon the subject.

The following is an extract from a speech of Colonel Benton, an active member of the democratic party, and a personal friend of the present President, delivered just previously to the late presidential election. Colonel Benton, speaking of several measures which had been passed by Congress, of which he disapproved, said:—

"The root of all this vicious legislation, and the opprobrium of our government, is a *new power* which has grown up at Washington, and which performs for legislation pretty much the same favour which caucuses and conventions perform for elections, that is, takes it out of the

hands of the people's representatives, and puts it into the hands of self-constituted managers. These are the class of *agents*, now multiplied to scores, and organised into a body, and *supplied with all the means of conciliating members* or combining interests. These guard the halls of legislation, and create interests strong enough to carry through bad measures, and to embargo the good, unless they consent to lend a helping hand to the bad. I am told the way now to get any large bill through Congress for a claim, or a contract, or even for a just grant of railroad land, is to apply to one of these agents as the effective man (members of Congress being considered quite secondary), arrange with him, and, like a good grand-juryman, keep your own and your fellow's counsel. The great game of 'log rolling'* then begins, and a mass of conglomerated measures pass easily, many of which could get no support alone. To lend a hand at a pinching vote—to get out of the way at a pinching vote, now becomes the duty of the mollified members, and negative votes absent, often answer the purpose as well as positive ones present. * * It was the *view* of such proceedings as these which induced the representative from North Carolina (Mr. Venables) to say in a speech at Richmond, Virginia, that 'with money enough any bill might be carried through Congress.'"

Thus much for the general notoriety of the fact. It is necessary to justify such accusations by a particular instance.

* "Log-rolling," means, "Help me in my job, and I will help you in yours."—Notes on Public Subjects, p. 123.

About three years ago a Dr. Gardiner brought forward before a committee of Congress claims to a large amount against the United States Treasury, which were allowed. It afterwards appeared, on investigation before a special committee of the House of Representatives, of which Mr. Preston King was chairman, that this testimony was forged. Senator Corwin was stated to have prosecuted those claims until he became Secretary of the Treasury; and another Secretary, Mr. Crawford, was publicly accused of being implicated in these transactions. The result of the investigation was, that the committee of the House of Representatives accompanied their report by a Bill, which very soon after passed into a law, a copy of which, to obviate all misapprehensions, I give entire in the Appendix.

The *New York Evening Post* of March 4, 1853, thus describes this Act, which passed on the 26th of the preceding month:—

"It punishes with fine and imprisonment any officer of

the United States Government, or member of either branch of Congress, and all persons in their official employ, who shall assist in the prosecution of any claim against the Government, except in the discharge of their official duties. * *

"It visits with like penalties, and also disqualifies for holding any public office, any person who shall give, and any member of Congress, or officer of the United States Government who shall receive, any gratuity or favour of any description designed to influence their votes or official action. * *

"While we profess our deep sense of the importance of this law, and the special obligations of the country to Mr. King, by whom it was reported, and through whose exertions and personal influence more than any other cause it was enacted, we cannot forbear expressing our mortification and regret that the necessity for any such legislation existed; that it has become necessary to threaten cabinet ministers with the penitentiary to keep them from peculation, and that members of Congress have been compelled to arm themselves with the heaviest penalties of the law against the temptations of their official position. * *

"Our pen has never fashioned any satire half so cutting, nor any invective half so bitter as this law, by which Congress deliberately declares that a necessity exists for invoking the aid of the judiciary to protect the country from the corrupt practices of its own members, and of the executive branch of the Government."

While the Act was, in the shape of a Bill,

under the consideration of the Senate, I find in the report of the proceedings of that body for the 25th of January, 1853, that—

"Mr. Hale, of New Hampshire, inquired whether the Bill covered the case of agents who were in the habit of daily exacting 'black mail' from sailors and officers of the navy, to get business done before the Department or Congress? He said that it had been shown under oath, that these men were in the habit of daily 'selling' Congress for a price, and if the Bill did not cover such cases, he desired that it lie over for amendment.

"Mr. Badger (who had charge of the Bill) said that 'the Bill did not cover what Mr. Hale desired, but he nevertheless hoped that it would be passed for what it did cover.'

"The Bill was then read a third time and passed."

The system, therefore, of bribery of members of Congress through the instrumentality of "agents," as described by Colonel Benton, is not only stigmatised, and sought to be prevented, by an Act of Congress, but admitted to exist in cases not reached by that Act.

Whether the one or the other mode, thus admitted to exist, by which certain members of Congress (and confessedly by no means a small proportion of them) add to the emoluments assigned to them by law as their daily

salary, can be put an end to by legislation, may well be doubted, inasmuch as it is plain that it is the direct result of a system, and not an occasional and exceptional phenomenon belonging to the obliquity and the low estimate of what is right and dignified, of this or that individual.

I should, nevertheless, be sorry to conclude this painful passage in the history of the working of the United States Legislature without pointing distinctly to the fact, that public opinion in that country has no difficulty in distinguishing between those members who lend themselves to these practices and those who do not; inasmuch as both Houses are known to contain, as they have ever contained, men as incapable of such practices as any who exist in the world.

I might very easily accumulate proofs in these pages of another fact, which the honest and dispassionate portion of public opinion in the United States admits—namely, that the general quality of the members sent to the national Legislature falls far short of the anti-

cipations formed of what would be the result of their constitutional system at the time of its formation.

One extract will suffice, from a communication addressed to a most respectable journal, and forwarded to me by a gentleman in the United States of the highest honour and character, and of the most ample means of judging correctly. He accompanied it with an expression of regret that he believed it to be "every word true." It is as follows, a few expressions being omitted which might give unnecessary pain:—

"Consider, for one moment, the inevitable effects of our present style of politics. The *quality of our politicians deteriorates most rapidly.** Write down a list of the twenty-five leading politicians of Washington's, Adams', or Jefferson's administration, and write opposite the names of our foremost twenty-five. . . . Have we not among our very foremost 'statesmen,' illiterate, shallow, noisy, boastful demagogues? . . . It seems to me that the business of politics is getting to be done, more and more, by such persons; that men of worth, dignity, and wisdom, more and more abstain from handling the political pitch

* The Italics are in the original. See also note, p. 167.

which defiles; that the apathy of the intelligent class, with regard to politics, has become almost complete."

It is with no feeling of satisfaction that I record these and other facts and opinions regarding the deviations of the United States' institutions from the ideal formed of them by their founders. What I have already adduced, and have yet to bring to notice, on competent and ample authority, will, I know, give pain to many persons in that country, and to some for whom I cherish the highest esteem and regard. But the interests of truth, in reference to this country, and especially to our colonies, require that minor considerations should not be allowed to interfere. It is now sixty-five years since the United States, in adopting a new, and, as she thought, a better, form of government, embarked on that unexplored sea; and no one has, since 1834, essayed systematically to lay down her course, and to mark the currents on which she has drifted. It concerns the civilised world to know how she is faring on that voyage. It may have been one that she could not avoid; and the course she has taken

may have been the best for her. It is not ours, and we may be thankful that it is not. But we have too many reasons to be justly proud of our country, and grateful for the Providential guidance of centuries, which has brought it to what it is, to have any need to seek aliment for our pride from the miscalculations or disappointments of our neighbours.

I do not quote any of those reports of "scenes" in the Senate or in the House of Representatives which are before me. Their character is sufficiently known from the specimens which from time to time find their way into our own papers. They are invariably reprobated by the American press, with all the force of language that a deep sense of the discredit reflected by them upon their national Legislature can command. The best portion of the American press speaks of them in a manner, showing how painfully they wound the feelings of every man of cultivation and honour in the community. The individuals capable of such language and conduct in either House of Congress are asserted to be

but few; and the outrage to decency is resented by the rest by the strongest marks of disapprobation. Nevertheless, two circumstances regarding them are conspicuous, and affect the character of the legislative assembly as well as that of individuals;—first, that the grossest and most insulting language is often repeated by the parties to the dispute, in spite of all attempts of the chairman to stop it, and appears to continue as long as it suits the pleasure of the disputants; next, that these mutual insults sometimes terminate without either the withdrawal of the offensive language on either side, or any attempt at explanation or apology; and the House rises without, as far as appears by the public reports, any adequate endeavour to assert its own dignity by insisting upon either one or the other.

We happily do not require, it is to be hoped, in this country, any warning as to the composition of our Legislature, or the conduct of our parliamentary debates, deducible from such facts and examples as those above ad-

verted to. But there are portions of our empire where it is of the utmost importance to their future well-being that these, as well as all the other lessons to be gathered from the experience of the working of the Constitution of the United States from its origin up to the present day, should be deeply considered and laid to heart.

Our colonies are embarking, and some of the finest and greatest of them have embarked, on the dignified and ennobling career of self-government. It must be the fervent aspiration of every patriotic breast in this country that they may act their part well and wisely, and may reproduce in new and favoured scenes, and over vast extents of the earth's surface compared with which this small island is but a speck, those moral and intellectual qualities and that conduct which have made the name of Great Britain honoured among mankind. But they must follow in the paths of Great Britain as closely as differences of circumstances will allow, if they would gather up the materials with which to form a moral, social,

and political fabric, which shall correspond in features and in strength to the one that has stood the test of many ages and of many trials. With the energy of youth, and a full share of its boldness, originality, and freedom, they will, if they are wise in time, combine that deference to experience which is among the first elements of real wisdom. It ought never to be forgotten by them, that without the nearest approaches which the circumstances of a new country may permit, to those social institutions which have formed the national character, and which make the British Constitution practicable at all, it will be of all things the most difficult to perpetuate that national character, and to preserve the great leading characteristics of that Constitution, in the true and genuine liberty it secures, in the moderation and justice which it enforces, and the high development of civilisation to which it leads.

New South Wales has just adopted a constitution from which, with the modifications which a due regard to the future may sug-

gest, the best results may be expected. The great and magnificent province of Canada has made the most satisfactory progress in self-government, under a constitution in all essential respects very similar to our own. It is ardently to be hoped, for her own sake, that she may preserve it. There is clearly nothing either in the theory or in the practical working of the institutions of the United States, which should lead her to wish to take them in exchange for those she now possesses. A little more than sixty years have sufficed to bring about a wide departure from the theory of the United States' Constitution in many important particulars; and it is patent to the world, that those departures have lowered the estimate of the United States Legislature in the eyes of their most respectable citizens. Canada has laid the foundation of a constitutional system which time will only strengthen and improve, not impair, if she adheres to it. While the popular element is, or shortly will be, strong enough to satisfy the most ardent advo-

cate of popular rights and liberties, the prerogative of the Crown is represented to as great an extent as is consistent with the circumstances of the country. If there be any value in the example and experience of England, it is impossible to deny, that it has been by the firm and judicious admixture and blending of both those powers, that our country has attained to that true liberty, and our Legislature to that character of dignity and ability, with which we have no reason to be dissatisfied. The vast resources of Canada are, under its entire freedom of action, being now developed with so much rapidity, and its wealth is accumulating so fast, that a comparatively short period only will elapse before the number of persons enjoying a high social position in the colony will be so much enlarged, as to afford a wide circle of choice to the Crown in constituting the Upper House of Legislature. There will be no want of persons who, by their abilities, their independence, and their cultivation, will give dignity to that branch of the Legislature, while their

connection with all the material interests of the colony will prevent their being removed beyond the reach of popular sympathies. It is not too much to anticipate that such a body, in a country so abounding in all the materials of future greatness as Canada, would, before many years were passed, present, in conjunction with the ability, skill, and energy of the Lower House, the spectacle of a Legislature, second only to our own in every quality that can command the esteem, and contribute to the self-respect and elevation of a people. Not therefore after sixty, but haply after more than six hundred years, her posterity may say—as the Roman did of old, and as we do now—"This framework has been knit together by the fortune and discipline of eight hundred years, and cannot be torn asunder without the destruction of those who would destroy it." *

There is one other incident to the practice of the payment of a salary to members of the

* Octingentorum annorum fortunâ disciplinâque compages hæc coaluit, quæ convelli, sine exitio convellentium, non potest.—*Taciti Hist.*, Lib. iv. c. 74.

Legislature, as shown by the example of the United States, which it is important should not be overlooked in Canada, namely, the unseemly disputes which are liable to arise between the two Houses on such questions as whether or not certain members have sent in charges for travelling expenses beyond what they can legitimately demand; or whether or not members have attended to their legislative duties on days for which they have sent in their accounts as having done so; questions, of which the least that can be said is, that they lower the position of both Houses in the eyes of the country. The following is the report of an occurrence in the Senate, taken from the ordinary report of the proceedings of Congress, published in the *National Intelligencer*, Washington, July 21, 1852:—

"IN SENATE,

"*July* 19, 1852,

"DEFICIENCY BILL.

"Mr. Hunter moved to take up Deficiency Bill, with the disagreement of the House of Representatives to the amendment of the Senate, appropriating 20,000 dollars for mileage, pay, &c., of senators.

"Mr. Hunter urged, among other arguments to induce the House of Representatives to agree to rescind their resolution, and allow this money to be paid to the senators, that it was in the power of the Senate, if it pleased, to retaliate, by causing the law to be enforced 'which forbids any member from receiving his pay except on those days on which he is actually in attendance.' Mr. Hunter proceeded thus:—'We know very well that this rule is not observed; and suppose that with this knowledge we were to move to cut down the appropriation for their pay, upon the plea that much of it was for time when they were absent from duty, and therefore not entitled under the law, would they not have cause to complain of us?'"

It will be strange, indeed, if Canada—after sixty years of perseverance in her present constitution—after the continuance for that period of the great increase in her wealth and well-being, of which she has every prospect—and after as many years' growth in all those sympathies and habits, and in that intellectual culture, which assimilate the best part of her population so much to that of this country—should be called upon to contemplate in either of her Houses of Legislature a scene so little in accordance with the sense of propriety of high-minded and independent men, as that above recorded.

The constituencies and representatives of Canada, in this early portion of their career of self-government, have a great responsibility before them. If views derived from circumstances which, with the present great prospects of that country, must be but temporary, do not prevail to alter the present foundations of her Constitution, and approximate it more to that of the United States, there can be no reasonable doubt that persons now living may see the day, when the material greatness of Canada will be only equalled by the moral dignity of her Legislature, and the high example and renown of her statesmen in both Houses of her Provincial Parliament.

It is somewhat singular that the very clause in the Constitution of the United States, which was looked to by its founders and defenders as the most admirable security against venality and undue influence,* should in practice have proved the very one which experience has

* The 2nd clause of the 6th section of Article 1; Tucker's Blackstone, App. 198, 214, 215, 375; Rawle on the Constitution, chap. xix.

shown to have facilitated and encouraged it. By the section alluded to it is, among other things, provided that "no person holding any office under the United States shall be a member of either House of Congress during his continuance in office." On this clause Mr. Justice Story remarks:*—

"The heads of departments are in fact thus precluded from proposing or vindicating their own measures in the face of the nation in the course of debate; and are compelled to entrust them to other men, who are either imperfectly acquainted with the measures, or are indifferent to their success or failure. Thus, that open and public responsibility for measures, which properly belongs to the executive in all governments, and especially in a republican government, as its greatest security and strength, is completely done away. The executive is compelled to resort to secret and unseen influence, to private interviews and private arrangements, to accomplish its own appropriate purposes; instead of proposing and sustaining its own duties and measures by a bold and manly appeal to the nation in the face of its representatives. One consequence of this state of things is, that there never can be traced home to the executive any responsibility for the measures which are planned and carried at its suggestion. Another consequence will be (if it has not yet been), that measures

* § 869.

will be adopted or defeated by private intrigues, political combinations, irresponsible recommendations, by all the blandishments of office, and all the deadening weight of silent patronage. The executive will never be compelled to avow or to support any opinions. Its ministers may conceal or evade any expression of their opinions. It will seem to follow, when in fact it directs, the opinions of Congress. It will assume the air of a dependent instrument, ready to adopt the acts of the legislature, when in fact its spirit and its wishes pervade the whole system of legislation. If corruption ever eats its way into the vitals of this republic, it will be because the people are unable to bring responsibility home to the executive, through its chosen ministers."

It is notorious that the working of this system was never more distinctly illustrated than during the negotiations between Canada and the United States at their commencement two or three years ago. The Legislature of Canada was prepared to enter upon a system of reciprocal free-trade, to a certain extent and on certain conditions, with the United States; and the Canadian ministry accordingly laid their propositions in due course before the United States Government. For the course of policy indicated by those propositions the ministry of Canada were responsible, and took upon them-

selves to carry them through the Canadian Parliament. This they both could and would have done; or in the improbable alternative of not being supported in their policy by the Legislature, they would have resigned their offices, and given way at once to the party commanding the legislative majority. Thus the will of the Legislature would have been acted upon either way, without procrastination, and in the open face of day. But as there is neither in the president, nor in the Legislature, nor in the ministers of the president at Washington, that direct and open responsibility for the policy of the Government, the negotiations could not be brought to the point at which a decision could be taken. The impatience of the public in Canada at the delays that ensued, obliged the ministry to take a course of their own, and to bring forward measures in the provincial Parliament of such a nature as alone could force on a decision on the part of the Government of the United States. The questions are still

under discussion, having passed, together with other points referring to the whole of the North American colonies, from the Canadian into the hands of the imperial ministry.

Mr. Justice Story agrees* that "one other reason in favour of allowing the heads of departments seats in the Legislature is, that it would compel the executive to make appointments for the high departments of Government, not from personal or party favourites, but from statesmen of high public character, talents, experience, and elevated services; from statesmen who had earned public favour, and could command public confidence." But these were just the reasons why the jealousy of high distinction, so conspicuous in republics, excluded such men from seats in the Legislature.† And of this circumstance in their history, Niebuhr speaks with all the authority due to his great name, his unbounded learning, and calm judgment. At

* § 870. † § 869.

vol. iii. p. 118, of his "Life and Letters," (London, 1853), he says: "The segregation of the public servants, and their exclusion from the Legislature, was the highest pitch of revolutionary madness."

[In reference to the passage quoted in page 151, it may be well to add that M. De Tocqueville made the same remark in 1834. He states, in vol. ii. ch. 5, of his work, "Il est évident que la race des hommes d'Etat Américains s'est singulièrement rapetissée depuis un demi siècle."

He attributes it (ch. 7) "to the ever-increasing action of the despotism of the majority."]

CHAPTER XI.

THE PRESIDENT'S NEGATIVE.*

It is a remarkable fact that the power and influence of the President of the United States upon the ordinary course of legislation, is far greater than can by any possibility be exercised by the Crown in this country.

Although, by the Constitution, the President's negative is only of a suspensive character, in point of fact it has been exercised with success, on important public measures, eleven times in sixty years, by four different Presidents.

* Article 1, sec. 7, clauses 2, 3. I omit a question previously touched upon by Mr. Justice Story—the right of the Senate to alter money bills. The constitutional practice of that country rests upon different grounds from our own, and is so settled in both countries, that no practical object would be answered by the discussion.

Mr. Justice Story admits* that the evils to be apprehended from a legislative body constituted as is that of the United States, are those which may arise from temporary excitements, from precipitancy, from political hostility, from faction, and unconstitutional legislation; and he says that the negative of the President is an important power, as an additional security against the enactment of rash, immature, and improper laws. The course of proceeding, as laid down by the first article of the Constitution (sec. 7, clause 3), is to the effect that if any objections made by the President to any bill are approved of by two-thirds of both Houses, the amended bill becomes law. By clause 3, if a bill, negatived by the President, is repassed by two-thirds of both Houses, it becomes law, the negative being thus overruled. "Right or wrong, he can be overruled by a vote of two-thirds of each House. If his objections be not thus overruled, the subject is only postponed, and is referred to the States and the people."†

* § 885. † President Polk's Message of 1848.

President Washington on one occasion exercised this constitutional power. President Jackson, in 1830, vetoed a bill for applying the funds of the Union to local improvements; and in 1832 placed his veto on a bill for renewing the Charter of the United States Bank. In 1841 President Tyler twice exercised his veto against bills for establishing a national bank; and in 1842 he three times exercised this power (twice against bills for altering the tariff). Four of these instances occurred within fifteen months, and against the advice of his Ministry. They were followed by an angry remonstrance from the Senate, and a protest on his part against that remonstrance. President Polk states in his last message (1848) that he had exercised his veto three times. He justifies the use he made of this constitutional power, and adds, that, in his opinion,—

"There is more danger that the President, from the repugnance he must always feel to come in collision with Congress, may fail to exercise it in cases where the preservation of the Constitution from infraction, or the public good, may demand it, than that he will exercise it unnecessarily and wantonly."

Considering the vast patronage in the hands of the President, which Mr. Justice Story adverts to as having "some tendency to create a counteracting influence in aid of his independence* (an assertion which he certainly need not have qualified by the word "some"), and considering also the principle of the payment of members and all that it has been shown to involve, including the complaints at its inadequate amount, it is abundantly clear that, in the ordinary course of things, the exercise of that patronage enables the President to cause the essential measures of the Government to pass through Congress, and permits him to mould or defer others which may not be in accordance with his views of policy. Thus he is able, though the general course of his policy may be disapproved of by both Houses of Legislature, to pass the supplies, and to wield for the term of his office the whole power of the Government. This was the case with President Tyler, who was at variance with the Senate during nearly the

* § 882.

whole course of his administration. And the latest and most notorious instance has only ceased with the last presidential election; the former President and his Ministry having been of the "Whig" party, and yet having succeeded in carrying on the government for four years in the face of a democratic majority against them, both in the House of Representatives and in the Senate. The President is also generally able to soften, or modify, or finally to suppress altogether, bills that may be adverse to his course of policy, or, in his opinion, precipitate, unwise, or dangerous, so that they may never be brought before him in such a shape as to call upon him, in obedience to his sense of public duty, to exercise his negative upon them.

But the President's negative would be of no avail should public opinion be roused upon any point to such a degree as to oblige two-thirds of both Houses of Congress to take part against him. Patronage and influence would then be alike overborne, and possibly at the very moment, and on the

very questions, when the truest regard for the general and permanent interests of the country would have required that a check should be placed upon the popular feeling of the moment. Then would be seen that weakness in the Executive of the United States which M. De Tocqueville has commented upon in reference to this as well as other portions of his ministerial character, and which reduces him, in times of excitement, to the position of "a mere agent of the popular will."*

The President of the United States combines in himself the two functions which belong in this country to the Crown and to the Prime Minister. In the exercise of the latter function he can, as has been seen, carry on the Government for a term of four years according to a policy which is disapproved of by the majority of both Houses of Legislature, and in every step of which they would be compelled to oppose him if they acted upon their convictions and their acknowledged principles. In the exercise of his higher function,

* De la Démocratie en Amérique, vol. i. ch. 8.

as the Executive of the State, he is armed with patronage, which, in ordinary cases, enables him so to regulate the course of legislation as to prevent the necessity of his having recourse to his power of negativing the measures of a hostile Legislature, but which power is liable to fail him at moments, when, in his opinion, there is the most need to use it.

On a comparison of the two systems, even from the point of view most in accordance with popular sympathies, it cannot be said that we have any reason to complain of our own. It is too obvious for remark, that no minister in this country can, under ordinary circumstances, retain office an hour after he has ceased to be supported by the majority of the House of Commons. The patronage in the hands of the Government is too small to enable him to do more (and then only at a time when parties should happen to be nicely balanced) than delay his fall. He must stand, if at all, upon the broad basis of his open and acknowledged policy, and when this ceases to be in unison with the opinion of the

House of Commons and the country, he must give way to some one else. That opinion may be somewhat more slow in forming and declaring itself, than the public opinion as represented in the Legislature of the United States; but it is only more slow because more anxious to reflect the matured wisdom of the community, and not its impulses. And when that opinion is once declared, it is seldom indeed that it is not final. Against any measure brought forward by a minister so supported, and upon the responsibility of the Government of the day, the Crown would never venture, except in some very extreme case, to interpose its negative. If it did, it would be by no exercise of "patronage," which it now possesses in so scanty a measure as to be almost inappreciable in reference to public affairs; it would be by no indirect "influence," which it has no means of bringing to bear upon the course of legislation, that it would seek to support itself. It would be by an appeal, which the act would indicate, to the intelligence and the justice of the nation,

which appeal would be all the more impressive and solemn because resting on no other ground than that of high constitutional principle. It may be anticipated that the good sense of the nation may prevent such an appeal from being ever necessary. The constitutional negative of the Crown is a power, to use the words of Burke, "the exercise of which is wisely forborne. Its repose may be the preservation of its existence, and its existence may be the means of saving the Constitution itself, on an occasion worthy of bringing it forth."*

* Letter to the Sheriffs of Bristol, A.D. 1777.

John Adams, afterwards the second President of the Republic, in his great work above quoted (vol. i. p. 70), expresses his "mortification" that the negative power of the Executive was imperfect, and the constitutional balance therefore "incomplete."

[President Polk, in his message of 1848, states that Washington once exercised his veto, and that *six* Presidents have done so. I have been unable to ascertain all the occasions.]

CHAPTER XII.

THE PRESIDENT'S MESSAGE.

We are familiar in this country with the lengthy document presented to both Houses of Congress by the President of the United States, at the opening of every new Session. This document, called the President's "message," contains, among other matters, an exposition of the opinions and intentions of the President and his ministry, in regard to the principal public questions of the day.

It might naturally, therefore, be expected, that this message would be immediately taken into consideration by each House, in order, first, that a respectful acknowledgment might be given to the head of the State for his communication, and next, that an opportunity might be afforded for expressing at once, if

need were, the concurrence or disapproval of either House in the general course of policy indicated by the message. And it may very well arise in that country, as it occasionally does in this, that the interests of the public may require an immediate expression of opinion on the part of the Legislature, as to whether it will support or oppose the policy of the ministry.

But to the President's message no answer is returned, and no discussion takes place upon it.

Under the two first Presidents of the Republic the practice was otherwise; and was, in fact, the same as our own. Mr. Justice Story thus describes the change, and records his opinion that it has not been for the public advantage.

"Under President Washington and President John Adams, the practice was to deliver speeches. President Jefferson discontinued this course, and substituted messages; and this practice has been since invariably followed. . . . When the habit was for the President to make a speech, it was in the presence of both Houses, and a written answer was prepared by each House,

which, when accepted, was presented by a committee. At present, no answer whatever is given to the contents of the message. And this change of proceeding has been thought by many statesmen to be a change for the worse, since the answer of each House enabled each party in the Legislature to express its own views as to the matters in the speech, and to propose, by way of amendment to the answer, whatever was deemed more correct and more expressive of the public sentiment than was contained in either. The consequence was, that the whole policy and conduct of the administration came under solemn review; and it was animadverted on, or defended, with equal zeal and independence, according to the different views of the speakers in the debate; and the final vote showed the exact state of public opinion on all leading measures. By the present practice of messages, this facile and concentrated opportunity of attack or defence is completely taken away; and the attack or defence of the administration is perpetually renewed at distant intervals, as an incidental topic in all other discussions, to which it often bears very slight or no relation. The result is, that a great deal of time is lost in collateral debates, and that the administration is driven to defend itself in detail, on every leading motion and measure of the session."*

It is probably not difficult to account for the change of practice, although Mr. Justice Story passes from the subject without further

* § 895.

comment. The fact is, that no "final vote" of either House of Legislature upon "the policy and conduct of the administration," to which Mr. Justice Story refers, would have any necessary effect in compelling the President to change that policy. It might bring out very glaringly to public notice the circumstance, that the Legislature and the President were at variance upon the general policy of his government; but it would not oblige him to dismiss his ministry, or to vary his policy in any one particular. The "patronage" in the hands of the President, and his "influence," would most probably enable him to carry on the ordinary affairs of government during his four years of office. All his favourite measures might, indeed, be rejected, but at the same time his "influence" might be sufficient to prevent measures, adverse to his policy, being forced upon him. The late Whig President, Mr. Filmore, and his ministry, were in favour of Protective duties. They were not able to carry their policy into effect; but during four years they prevented the contrary policy, which was that

of the majority of both Houses of Congress, from being extended. Congress dissented from the policy of President Tyler, and rejected his measures; but he found the means of carrying on his government, in spite of their opposition to his general policy. We see, therefore, in this silent reception of the Message, another illustration of the fact that, under a democratic Government, the head of the State, wielding the powers of that Government, can for a period of four years counteract and effectually resist the popular opinion as expressed in its two Houses of Legislature. Supposing it possible, which it is not, that a parallel case should exist in this country, the ministry of the Earl of Derby would have remained in office until the 27th of February, 1856, and the question of protection would have been still agitating the public mind in England.

A common, though superficial, criticism upon the speeches delivered at the opening of each session of Parliament by the Crown, on

the responsibility of the ministry, is, that, they are too short and too indefinite.

If they are sufficiently definite to convey the announcement of the general principles of the ministerial policy, and of the measures it purposes submitting to the Legislature, they convey all that is required to enable either House, if it considers that the public interests require it, at once to declare itself hostile to or disposed towards that policy. To commit the Crown to details in any such announcement is obviously undesirable, inasmuch as the details of measures belong more particularly to the deliberative bodies by whom these measures will be fully considered. And it is equally obvious that the ministerial exposition, when the measure is presented to either House, can and does go much further into detail than any "message" can possibly do, however lengthy; and at a time when it is most convenient for the purposes of discussion that those details should be laid before the House and the public.

CHAPTER XIII.

POWERS OF CONGRESS.

WITH two or three exceptions, the matters falling within the jurisdiction of Congress are the same as those that are within the province of the Legislature of this country. The first exception to be noticed respects the important article of taxation. In this the powers of Congress are limited. They extend only to the specific objects of "paying the debts and providing for the common defence and welfare of the United States" (sect. 8, clause 1). "A tax, therefore, laid by Congress for neither of these objects would be unconstitutional, and in excess of its legislative authority."* The power of taxation for all other purposes except those mentioned remains in the several State

* Story, § 908.

Legislatures. In the adjustment of these powers between the general Government and that of the different States many questions arose, which are discussed at length by Mr. Justice Story, but they have little practical bearing beyond the limits of that country.

The more important exception in a general point of view relates to the power of declaring war. This power, which with us is the exclusive prerogative of the Crown, is placed by the Constitution of the United States in the hands of Congress. By the article above quoted Congress is empowered "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water."

The object in view, according to Mr. Justice Story, in placing the power of making war in the hands of the two Houses of Congress, instead of intrusting it to the President, was "to make it more difficult to declare war." "War being in its nature and effects so critical and calamitous, it requires the utmost deliberation, and the successive review of all

the councils of the nation."* It was proposed at the time of the framing of the Constitution, that as promptitude of action, as well as wisdom, were required on such critical occasions as may justify war, it would be more expedient to place the power of declaring it in the Senate alone; a body composed of men of great "weight, sagacity, and experience."* But the argument prevailed that it would be desirable to interpose delay, by requiring the consent of the bodies more directly representing the mass of the people, who would have to pay the taxes incident to war.

Mr. Justice Story is of opinion that the restriction might have been usefully extended still further; that "the Executive who is to carry it on" ought to have a voice in determining whether it ought to be entered upon at all. And he adds, that "there might be a propriety in enforcing still greater restrictions, as, by requiring a concurrence of two-thirds of both Houses;"* for in his opinion "the history of republics has but too fatally

* § 1171.

proved that they are too ambitious of military fame and conquest, and too easily devoted to the views of demagogues, who flatter their pride and betray their interests." . . . . Under such circumstances war "is sometimes fatal to liberty itself, by introducing a spirit of military glory, which is ready to follow wherever a successful commander will lead."*

It is continually asserted with great earnestness by persons who have the highest claims to respectful attention in the United States, —and their opinions are reflected in the most respectable portions of the press of that country—that the tendencies of the public mind there are not towards "military fame and conquest," and that the ambition of military glory, and the readiness to be swayed by those who have obtained it, are not, to any dangerous extent, the characteristics of the mass of the people. That the persons who take this view do so in all sincerity, there can be no possible doubt; and their hope is that their influence, and those ties of peace arising

* § 1171.

out of material interests, which are daily expanding, and embracing more and more persons in the community, will be sufficient in any time of real danger to counterbalance and restrain the aggressive tendencies of the more excitable portion of their fellow-citizens.

Whatever may be the case in future, it cannot be said that the history of the past gives encouragement to any such hope. It is perfectly well known, and admits of no dispute, that both the Texan and the Mexican war were entered into against the opinions and in spite of the energetic warnings of a vast proportion of the most mature statesmen of the country, supported by the whole weight of that portion of the community above referred to. But there is no need to go back even to those comparatively recent instances for proof of the aggressive tendencies of the people of the United States, considered as a whole, and judged of by the acts of their Government. The whole of the exceedingly minute and elaborate despatch of the late Secretary for Foreign Affairs in that country,

Mr. Everett, on the subject of Cuba, dated 1st December, 1852, and addressed to the Minister for Foreign Affairs in Great Britain, is devoted to proofs and illustrations of the fact that the public opinion of the United States has compelled the Government to advance in that career of conquest and annexation, the successive steps of which he at so much length describes. But Mr. Everett goes beyond that, and avows, in relation to the question then at issue, that any treaty entered into between the United States, France, and Great Britain, containing mutual engagements to respect the present state of possession of the Island of Cuba in all future time, would but give "a new and powerful impulse" to those acts of lawless aggression which the Government of the United States, though it had disavowed and discouraged them, had not been able to prevent.

It cannot be a matter of surprise that Lord John Russell, as Secretary of State for Foreign Affairs, should, in his answer of the 16th of February, 1853, to Mr. Everett's despatch,

have described the above argument and admission as "disquieting."

The attacks that had been made on the island of Cuba "by lawless bands of adventurers from the United States, with the avowed design of taking possession of that island," had been, under various pretexts, for the most part openly justified by a large, powerful, and active portion of the press of that country, representing the opinions of the ultra-democratic party; or, if condemned, condemned with such a quality of censure as implied, and in fact gave, encouragement to renewed efforts. One of the most common topics of justification was, that Great Britain and France were each intriguing to obtain a cession of the island from Spain, and that it was necessary to anticipate them by assisting the inhabitants to declare their independence of Spain, with the view to their then applying for admission into the Union.

To prove to the world that the imputation of any such intrigue was groundless, the Earl of Malmesbury, then Secretary of State for

Foreign Affairs, on the part of Great Britain, and M. de Turgot on the part of France, proposed to the Government of the United States, that they should "declare, severally and collectively, that they will not obtain, or maintain for themselves, or for any one of themselves, any exclusive control over the said island of Cuba, nor assume nor exercise any dominion over the same."

Such a convention would manifestly give every security to the United States, that Cuba would never fall into the hands of either of the only two powers ever likely to be "rivals" with the United States for the possession of it."

But Mr. Everett, on the part of his Government, refused to enter into any such convention, on two grounds.

The first, by asserting "that Cuba is to the United States what an island at the mouth of the Thames or the Seine would be to England or France," seems to imply, in the words of Lord John Russell's despatch, "that Great Britain and France have no interest in the maintenance of the present *status quo* in

Cuba, and that the United States have alone a right to a voice in that matter."

To any such implied argument there could be but one answer, which was given by Lord John Russell in language which it is impossible to mistake.

"Her Majesty's Government at once refuse to admit such a claim. Her Majesty's possessions in the West Indies alone, without insisting on the importance to Mexico and other friendly States, of the present distribution of power, give Her Majesty an interest in this question which she cannot forego. The possessions of France in the American seas give a similar interest to France, which no doubt will be put forward by her Government."

Mr. Everett's second ground for refusing to enter into the proposed convention was that above adverted to—namely, that by so doing, the Government of the United States would only strengthen the hands of the persons engaged in those violations of international law; that, "instead of putting a stop to those lawless proceedings, this would give a new and powerful impulse to them."

Upon this, Lord John Russell very truly

remarks, that this is "a melancholy avowal for the chief of a great State."

The force of public opinion, which had compelled "the absorption or annexation of Louisiana in 1803, of Florida in 1819, of Texas in 1845, and of California in 1848," according to the enumeration of Mr. Everett, is now being brought to bear upon the acquisition of Cuba, by a powerful party in the United States, whose cry is, that it is the "manifest destiny" of their Government "to absorb the whole of that continent and the islands."

The weakness of the Executive in the United States has rendered nugatory the attempts of the Government to prevent those lawless attacks upon Cuba, which it disavows and stigmatises.

The Secretary for Foreign Affairs, Mr. Everett, while refusing on the part of his Government to take a step which would entirely deprive those lawless attempts of the principal argument on which they rely for their justification, assigns reasons for his refusal which

give direct support to the idea, that the annexation of Cuba is to be looked upon as only a portion of the progressive increase of the possessions of the United States, without reference to the rights and interests of other powers; and that any act done by the Government of the United States with the view of repressing the march of lawless aggression towards that object, would only accelerate it, and diminish in proportion the authority and means of the Government itself, in support of the law of nations, and the principles of justice and good neighbourhood.

If that be so, even the recommendation of Mr. Justice Story, that, in order to put a more effectual check upon the power of declaring war, the concurrence of two-thirds (instead of, as at present, a majority) of both Houses of Congress should be rendered necessary, would have but a slight chance of interposing an effectual barrier against views and expectations that make such little account of the rights of others. There can be but one effectual obstacle to such pretensions—namely,

the knowledge of the fact, that the powers interested in maintaining those rights have both the strength and the will to cause them to be respected; and that lawless aggression, however disguised, and however supported, will be met at once by a force capable of maintaining "the eternal laws of right and wrong," and inflicting punishment on those who violate them.*

* Mr. Everett has, since he quitted office, taken the somewhat remarkable course of addressing to Lord John Russell, and publishing in the American papers, a letter in answer to Lord John Russell's despatch, addressed to him as the Minister of Foreign Affairs of the United States.

Upon this private letter, thus made public property,* public comment is justifiable.

Mr. Everett states that his reference to the absorption or annexation of Louisiana, Florida, Texas, and California "was intended as an illustration of the proposition that the entire history of the United States shows it to be chimerical to attempt, in reference to specific measures, to bind up for all future time the discretion of a Government established in a part of the world of which so much is still lying in a state of nature."

It may be asked, "Is Cuba in a state of nature?" and can an argument of this kind, equivocal with regard to the other

* See also the *Daily News* of October 8, 1853, in which Mr. Everett's letter, occupying above two columns, is given entire.

enumerated instances, be held in any respect applicable to this?

Mr. Everett adduces this further justification of his line of reasoning:—

"Nor does the remark in my letter of the 1st December, that a disposition to engage in such enterprises would be increased rather than diminished by our accession to the proposed convention, strike me as a 'melancholy avowal,' as you pronounce it, on the part of the President. You forget the class from which such adventurers are, in all countries, enlisted—the young, the reckless, the misinformed. What other effect could be expected to be produced on this part of the population by being told that their own Government, in disregard of the most obvious public interests, as well as of the most cherished historical traditions, had entered into a compact with two foreign powers to guarantee the perpetuity of the system under which Cuba now suffers?"

Upon this it is to be observed, that to "the young, the reckless, and the misinformed," as the prime movers of the lawless aggression against Cuba, are to be added members of both Houses of Congress, officers in the public employ of the United States, and no unimportant portion of the public press.

It is further to be remarked, that it was no object of the two foreign powers "to guarantee the perpetuity of the system under which Cuba now suffers." The expressions of the Minister of Great Britain to the Spanish Government, quoted by Mr. Everett himself, show that the greatest efforts had been and were being made to produce an amelioration of that system. Lastly, it is to be noticed that Mr. Everett refers to "the most obvious public interests" of the United States as counselling abstinence from any such pledge as the one offered to her acceptance.

On the latter point Mr. Everett is even more explicit in other paragraphs. He states that Lord John Russell miscon-

conceived his meaning in understanding him to imply "that Great Britain and France had no interest in the *status quo* in Cuba."

"Our doctrine is, not that we have an absolutely exclusive interest in the subject, but that we have a far deeper and more immediate interest than France or England can possibly lay claim to." "Therefore," he adds, "I do not see why we have not as good a right to obtain, if we can, from Spain, the voluntary cession of Cuba, as Great Britain had to accept the compulsory cession of Trinidad."

After such plain language as this, it is vain for Mr. Everett to expect to check the aspirations or the actions of those who desire to obtain Cuba at any cost, by the expression, in this same letter, of his individual opinion, "as a private citizen," as being adverse to its annexation; "that he does not covet it."

To the same real effect are the words of the late President, Mr. Filmore, in his message of 6th Dec., 1852. After disclaiming, on the part of the Government, any designs of the United States against Cuba, he adds that "he should regard its incorporation into the Union *at the present time* as fraught with serious peril." And the present President (Mr. Pierce), in his inaugural address, delivered in March, 1853 (see p. 228), has thrown off all disguise, and has proclaimed the policy to which his predecessor had already given an implied sanction.

When men of the first position in the United States openly adopt, and while others in one breath condemn, and in the next encourage the idea of the annexation of Cuba, and speak of it as only a question of time, there will not be wanting other persons besides "the young, the reckless, and the misinformed," who will be ready to profit by such teaching. The greater or less amount of interest which the two countries may have in the matter, is not the question. It is sufficient that the interests of England are great and important in the whole of

that quarter of the world. It is to be hoped that the day is far distant when she would look with indifference upon a blow aimed at the very least of them; whether prepared by such means, covert and open, as ended in the annexation of Texas, or by bands of "lawless adventurers," whom the Executive of the United States is unable to control, or by persons of a very different stamp, whose actions are condemned in words, but in effect encouraged, by men lately responsible for the public policy of that country, and are now openly sanctioned by the President.

It will be necessary to recur briefly to this subject in the next chapter, in illustration of the political position of the Executive.

CHAPTER XIV.

THE EXECUTIVE.

By the second article of the Constitution* the Executive power is vested in the President of the United States, who holds his office for the term of four years.

The object to be aimed at in every well-organised Government, in respect to the Executive, is correctly stated by Mr. Justice Story to be the securing as great an amount of energy as is consistent with the public liberties; and he proceeds to remark that—

"The notion is not uncommon, and occasionally finds ingenious advocates, that a vigorous Executive is inconsistent with the genius of a Republican Government."†

To this he answers most truly, that—

"It is difficult to find any sufficient grounds on which

* Section 1, clause 1. † § 1417.

" to rest this notion; and those which are usually stated belong principally to that class of minds which readily indulge in the belief of the general perfection, as well as the perfectibility of human nature, and deem the least possible quantity of power, with which Government can subsist, to be the best. To those who look abroad into the world, and attentively read the history of other nations, ancient and modern, far different lessons are taught with a severe truth and force. Those lessons instruct them that energy in the Executive is a leading character in the definition of a good government. It is essential to the protection of the community against foreign attacks. It is not less essential to the steady administration of the laws—to the protection of property against those irregular and high-handed combinations, which sometimes interrupt the ordinary course of justice, and to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy. . . . . "A feeble Executive implies a feeble execution of the Government. A feeble execution is but another phrase for a bad execution, and a government ill executed, whatever may be its theory, must, in practice, be a bad government." *

He then lays it down that—

"The ingredients which constitute energy in the Executive are, unity, duration, an adequate provision for its support, and competent powers. The ingredients which constitute safety in a republican form of government are, a due dependence on the people, and a due responsibility to the people." †

* § 1417. † § 1418.

Montesquieu has said that "the executive branch of government, having need of despatch, is better administered by one than by many."* The best writers have invariably considered energy as the most necessary qualification of the Executive; and that this energy, manifested in the qualities of "decision, activity, secrecy, and despatch," will be best secured by placing the executive power in one hand rather than in many.

The manner in which the executive power is adjusted under the British Constitution, as well as the practical efficacy of that power, present some striking contrasts with both the theory and practice of the United States.

By the theory of our Constitution, our hereditary Sovereign is invested with the power of the Executive. In the exercise of this power, the prerogatives of the Crown are known and respected, and it is a fundamental axiom that within the limits of those prerogatives the Sovereign "can do no wrong." Removed beyond the sphere of popular interference and

* Bk. ii. chap. vi.

control, by position, by the certainty and duration of power and, in many important particulars, in the exercise of that power, the Crown of Great Britain nevertheless, in all the ordinary concerns of government, acts, and practically can only act, through the instrumentality, and on the advice and responsibility, of the Executive Council, composed of the principal Ministers of State. This Executive Council is not too numerous to fulfil the first requirements of a properly-constituted executive authority, in the ability to act with decision, energy, secrecy, and despatch, in cases requiring those qualities. And owing the circumstance of their being called upon to act at all (or at least of their continuing to act), to the fact of their also representing, and being supported by, the majority of the Legislature, they combine, with the authority of the Crown, which is stable, uniform, exalted, and independent of popular influences, the power of the whole body of the community as expressed by the majority of both Houses of Parliament.

The last thing, therefore, of which there is any complaint or apprehension in this country is, that there should be any weakness in the Executive. There may be indecision in the public councils, and there may be difficulties in coming to conclusions as to what laws should or should not be enacted; but the law once passed, the decision once taken, it is carried into effect with an authority and a vigour which no individual and no combination of individuals can successfully resist.

Under the Constitution of the United States the position of the President, as the Executive magistrate, is wholly different. "He is chosen by and made responsible to the people." He therefore acts through no executive council, neither is his responsibility in any way divided or controlled. Being made responsible to the people by being specially elected to that office, he has "the exclusive management of the affairs for which he is thus made responsible."*

It might naturally be imagined that an

* Story, § 1427.

officer thus elected, and thus directly appointed by the people to this high office of sole executive magistrate, should therefore, in the exercise of his duties, feel himself armed with an authority so firm, as to leave no room for doubt or hesitation on any occasion that called for the exercise of it; and the more so because he is the representative of the last, and that a very recent, expression of the popular will.

But the fact is not so. The weakness of the Executive of the United States is not disputed. Many reasons have been given for this. One very obvious one is, that having been but recently chosen as the representative of public opinion, he cannot act with vigour against the sense of any large body of his supporters, should his duty require him to do so, without alienating those supporters, or perhaps converting them into opponents. But the principal reason is, the want of duration in office; in fact, the very peculiarity in his position which most distinguishes him from the Executive of this country.

That such is the inclination of Mr. Justice

Story's opinion is abundantly clear from the following passages:—

"It has been already mentioned that duration in office constitutes an essential requisite to the energy of the executive department. This has relation to two objects; first, the personal firmness of the chief magistrate in the employment of his constitutional powers; and, secondly, the stability of the system of administration which may have been adopted under his auspices. With regard to the first, it is evident that the longer the duration in office, the greater will be the probability of obtaining so important an advantage. A man will naturally be interested in whatever he possesses, in proportion to the firmness or precariousness of the tenure by which he holds it. He will be less attached to what he holds by a momentary or uncertain title, than to what he enjoys by a title durable or certain; and of course he will be willing to risk more for the one than for the other. This remark is not the less applicable to political privilege, or honour, or trust, than to any article of ordinary property. A chief magistrate, acting under the consciousness, that in a very short time he must lay down office, will be apt to feel himself too little interested in it to hazard any material censure or perplexity from an independent exercise of his power, or from those ill-humours which are apt at times to prevail on all governments. If the case should be that he should, notwithstanding, be re-eligible, his wishes, if he should have any for office, would combine with his fears, to debase his fortitude, or weaken his integrity, or enhance his irresolution.

"There are some, perhaps, who may be inclined to regard a servile pliancy of the Executive to a prevalent faction or opinion in the community, or in the Legislature, as its best recommendation. But such notions betray a very imperfect knowledge of the true ends or objects of government. While republican principles demand that the deliberate sense of the community should govern the conduct of those who administer their affairs, it cannot escape observation that transient impulses and sudden excitements, caused by artful and designing men, often lead the people astray, and require their rulers not to yield up their permanent interests to any delusions of this sort. It is a just observation that the people commonly intend the public good. But no one but a deceiver will pretend that they do not often err as to the best means of promoting it. Indeed, beset as they are by the wiles of sycophants, the snares of the ambitious and the avaricious, and the artifices of those who possess their confidence more than they deserve, or seek to possess it by artful appeals to their prejudices, the wonder rather is, that the errors are not more numerous and more mischievous. It is the duty of their rulers to resist such bad designs at all hazards; and it has not unfrequently happened that by such resistance they have saved the people from fatal mistakes, and, in their moments of cooler reflection, obtained their gratitude and their reverence. But how can resistance be expected where the tenure of office is so short, as to make it ineffectual and insecure?"*

What should be the proper duration of

* §§ 1430, 1431.

office for the President of the United States is, according to Mr. Justice Story's opinion,—

"Matter of more doubt and speculation. On the one hand, it may be said that the shorter the period of office, the more security there will be against any dangerous abuse of power. The longer the period the less will responsibility be felt, and the more personal ambition will be indulged. On the one hand, the considerations above stated prove that a very short period is, practically speaking, equivalent to a surrender of the executive power, as a check in government, or subjects it to an intolerable vacillation and imbecility."*

Accordingly, during the discussions upon the Constitution in the Convention that framed it, it was proposed by Mr. Madison, Mr. Hamilton, and Mr. Jay, three of the ablest statesmen of that remarkable period, that the Executive of the United States should be appointed "during good behaviour, or in other words, for life."† By other members of the Convention it was proposed that the appointment should be for seven years. The opinion in favour of the appointment for four years

* § 1435. † § 1436, note.

only, prevailed, and upon this Mr. Justice Story thus expresses himself:—

"Whether the period of four years will answer the purpose for which the Executive department is established, so as to give it at once energy and safety, and to preserve a due balance in the administration of the Government, is a problem which can be solved only by experience. That it will contribute far more than a shorter period towards these objects, and thus have a material influence upon the spirit and character of the Government, may be safely affirmed. Between the commencement and termination of the period of office, there will be a considerable interval at once to justify some independence of opinion and action, and some reasonable belief that the propriety of the measures adopted by the Administration may be seen and felt by the community at large. The Executive need not be intimidated in his course by the dread of an immediate loss of public confidence, without the power of regaining it before a new election; and he may, with some confidence, look forward to that esteem and respect of his fellow-citizens, which public services usually obtain when they are faithfully and firmly pursued with an honest devotion to the public good. If he should be re-elected, he will still more extensively possess the means of carrying into effect a wise and beneficent system of policy, foreign as well as domestic. And if he should be compelled to retire, he cannot but have the consciousness that measures long enough pursued to be found useful will be persevered in; or if abandoned, the contrast will reflect new

honour upon the past administration of the Government, and perhaps reinstate him in office. At all events, the period is not long enough to justify any alarms for the public safety. The danger is not that such a limited Executive will become an absolute dictator; but that he may be overwhelmed by the combined operations of popular influence and legislative power. It may be reasonably doubted, from the limited duration of this office, whether, in point of independence and firmness, he will not be found unequal to the task which the Constitution assigns him."* . .

Again, the executive magistrate of the United States "being chosen by and made responsible to the people," has, as we have seen above, "the exclusive management of the affairs for which he is thus made responsible."† He is, in fact, the prime minister of the country, irremovable for four years, as well as the executive magistrate. Accordingly Mr. Justice Story thus speaks of the duties imposed upon him:—

"The nature of the duties to be performed by the President, both at home and abroad, are so various and complicated as not only to require great talents and great wisdom to perform them in a manner suitable to their importance and difficulty, but also long experience in

* § 1439. † § 1427.

office to acquire what may be deemed the habits of administration, and a steadiness as well as comprehensiveness of view of all the bearings of measures. The executive duties in the [individual] States are few, and confined to a narrow range; those of the President embrace all the ordinary and extraordinary arrangements of peace and war, of diplomacy and negotiation, of finance, of naval and military operations, and of the execution of the laws through almost infinite ramifications of details, and in places at vast distances from each other. He is compelled constantly to take into view the whole circuit of the Union, and to master many of the local interests and other circumstances which may require new adaptations of measures to meet the public exigencies. Considerable time must necessarily elapse before the requisite knowledge for the proper discharge of all the functions of his office can be obtained; and after it is obtained, time must be allowed to enable him to act upon that knowledge, so as to give vigour and healthfulness to the operations of the Government."*

It will excite no surprise that Mr. Justice Story, after the above description of the qualifications required in a President, should pronounce a very guarded and qualified opinion as to the sufficiency of his term of office of four years. His words are—

* § 1440.

"Hitherto our experience has demonstrated that the period has not been found practically so long as to create danger to the people, or so short as to take away a reasonable independence and energy from the Executive. Still, it cannot be disguised that sufficient time has scarcely yet elapsed* to enable us to pronounce a decisive opinion upon the subject."† . . . .

The experience of the last twenty years has certainly not strengthened the presumption in favour of the "reasonable independence and energy" of the Executive of the United States.

The quick recurrence of the period which is to decide whether he is to be re-elected or returned to private life, cannot but exercise an unfavourable influence over his proceedings. The question whether it would not be more conducive to the public interests that he should be elected for a longer period, and be then ineligible for re-election, is one which is considered open to discussion. On this subject, Mr. Justice Story says :—

"A President chosen for ten years might be made ineligible with far less impropriety than one chosen for

* Written in 1833. † § 1441.

four years. And a President chosen for twenty years ought not to be again eligible, upon the plain ground that by such a term of office his responsibility would be greatly diminished, and his means of influence and patronage greatly increased, so as to check in a great measure the just expression of public opinion, and the free exercise of the elective franchise. Whether an intermediate period, say of eight years, or of seven years, as proposed in the Convention, might not be beneficially combined with subsequent ineligibility, is a point upon which great statesmen have not been agreed, and must be left to the wisdom of future legislators to weigh and decide. The inconvenience of such frequently-recurring elections of the chief magistrate, by generating factions, combining intrigues, and agitating the public mind, seems not hitherto to have attracted as much attention as it deserves. One of two evils may possibly occur from this source; either a constant state of excitement, which will prevent the fair operation of the measures of an Administration; or a growing indifference to the election, both on the part of candidates and the people, which will surrender it practically into the hands of the selfish, the office-seekers, and the unprincipled devotees of power. It has been justly remarked by Mr. Chancellor Kent, that the election of a supreme executive magistrate for a whole nation affects so many interests, addresses itself so strongly to popular passions, and holds out such powerful temptations to ambition that it necessarily becomes a strong trial to public virtue, and even hazardous to the public tranquillity."*

* § 1449.

The mode of election for the President and vice-President, originally adopted, and continued until the amendment of the Constitution in that particular in 1804, was (by art. 2, sect. 1) by electors specially appointed for that purpose by the Legislature of each State (in number equal to the number of the senators and representatives of each State), who were to conduct the election in the manner pointed out in that article. The votes of these "electoral colleges" were directed to be transmitted to the seat of the national Government, to be counted in the presence of both Houses, and the result declared. The person having a majority of the whole number of votes was to be President. But if no one of the candidates had such a majority, then the House of Representatives, the popular branch of the Government, was to elect from the five highest on the list the person whom they might deem best qualified for the office, each State having one vote in the choice.* The person having the next highest number of votes was to be vice-president. If

* § 1454.

two or more had equal votes, the Senate was to choose the vice-president.

On this mode of election Mr. Justice Story observes, that the principal difficulty that had been felt on the subject was—

"The constant tendency, from the number of candidates, to bring the choice into the House of Representatives. This has already occurred twice in the progress of the Government, and in the future there is every probability of a far more frequent occurrence. This was early foreseen; and even in one of the State conventions, a most distinguished statesman, and one of the framers of the Constitution, admitted that it would probably be found impracticable to elect a President by the immediate suffrages of the people; and that in so large a country many persons would probably be voted for, and that the lowest of the five highest on the list might not have an inconsiderable number of votes. It cannot escape the discernment of any attentive observer, that if the House of Representatives is often to choose a President, the choice will, or at least may, be, by many motives independent of his merits and qualifications. There is danger that intrigue and cabal may mix with the rivalries and strife. And the discords, if not the corruptions generated by the occasion, will probably long outlive the immediate choice, and scatter their pestilential influences over all the great interests of the country. One fearful crisis was passed in the choice of Mr. Jefferson over his competitor Mr. Burr in 1801, which threatened a dissolution of the Govern-

ment, and put the issue upon the tried patriotism of one or two individuals, who yielded from a sense of duty their preference of the candidate generally supported by their friends."*

The issue of this contest of 1801 gave rise to the amendment of the Constitution in 1804, above adverted to—

"Materially changing the mode of the election of President. In the first place, it provides that the ballots of

* § 1464. Mr. Justice Story here adds in a note, "Allusion is here especially made to the late Mr. Bayard, who held the vote of Delaware, and who, by his final vote in favour of Mr. Jefferson, decided the election. It was remarked at the time, that in the election of Mr. Jefferson, in 1801 (which was made by the House of Representatives in consequence of none of the candidates having a majority of the whole number of voters), the votes of two or three States were held by persons who soon afterwards received office from him. The circumstance is spoken of in positive terms by Mr. Bayard, in his celebrated speech on the Judiciary in 1802. Mr. Bayard did not make it matter of accusation against Mr. Jefferson, as founded on corrupt bargaining, nor has any such charge been subsequently made. The fact is here stated merely to show how peculiarly delicate the exercise of such functions necessarily is; and how difficult it may be, even for the most exalted and pure Executive, to escape suspicion or reproach, when he is not chosen directly by the people. Similar suggestions will scarcely fail of being made, whenever a distinguished representative obtains office after an election of President, to which he has contributed."

the electors shall be separately given for President and vice-president, instead of one ballot for two persons as President; that the vice-president, like the President, shall be chosen by a majority of the whole number of electors appointed; that the number of candidates out of whom the election of President is to be made by the House of Representatives, shall be three instead of five; that the Senate shall choose the vice-president from the two highest numbers on the list; and that if no choice is made of President before the 4th of March following, the vice-president shall act as president."*

Upon this amendment Mr. Justice Story remarks, that it

"Has alternately been the subject of praise and blame, and experience alone can decide whether the changes are for the better or the worse."†

And to the same effect are the observations of Mr. Justice Kent in his "Commentaries"‡—

"The election of 1801 threatened the tranquillity of the Union; and the difficulty that occurred in that case in producing a constitutional choice, led to the amendment of the Constitution on this subject; but whether the amendment be for better or for worse, may be well doubted, and remains yet to be settled by the lights of experience."

One of the principal reasons which weighed

* § 1466. † § 1468. ‡ Vol. i. p. 279.

with the framers of the Constitution, in recommending that a small body of persons should be "selected by their fellow-citizens from the general mass" for the specific purpose of electing a President, was, that such a body "would be most likely to possess the information, discernment, and independence, essential for the proper discharge of this duty."*

Mr. Justice Kent also describes it thus:— "To close the opportunity as much as possible against negotiation, intrigue, and corruption," the Constitution has confided the power of election to a small body of electors appointed in each State under the direction of the Legislature, and has left to Congress the determination of the day when these electors are to be called together.†

In all that regards the independence of the electors, the object has manifestly not been answered.

Mr. Justice Story thus describes the actual

* Story, § 1457.

† Kent's Commentaries, vol. i. p. 274.

practice, which has long since assumed a form completely at variance with the theory of the Constitution in this important particular:—

"It has been observed, with much point, that in no respect have the enlarged and liberal views of the framers of the Constitution, and the expectations of the public, been so completely frustrated as in the practical operation of the system, so far as relates to the independence of the electors in the electoral colleges. It is notorious that the electors are now chosen wholly with reference to particular candidates, and are silently pledged to vote for them. Nay, upon some occasions the electors publicly pledge themselves to vote for a particular person, and thus, in effect, the whole foundation of the system so elaborately constructed is subverted. The candidates for the presidency are selected and announced in each State long before the election, and an ardent canvass is maintained in the newspapers, in party meetings, and in the State Legislatures, to secure votes for the favourable candidates, and to defeat his opponents. Nay, the State Legislatures often become the nominating body, acting in their official capacities, and recommending by solemn resolves their own candidates to the other States. So that nothing is left to the electors after their choice, but to register votes which are already pledged; and an exercise of an independent judgment would be treated as a political usurpation, dishonourable to the individual, and a fraud upon his constituents."*

* Story, § 1463.

But another practice has arisen, equally unknown to the Constitution, and equally destructive of all independence of choice on the part of the electors. It is obvious, that if all the candidates for the presidency on either side were to be submitted to the electors, there would be a great probability that no one would obtain a majority of the total number of votes, and that, consequently, the selection of a President would be transferred to the House of Representatives, in the manner pointed out by the Constitution.

To prevent this, delegates of each party are appointed previously, to meet in Convention, and to determine which of the perhaps numerous candidates on their side shall be adopted as the candidate of the party.

When the Convention has met and decided, the announcement is made of the result, and all the electors belonging to their party, or to any one of the many shades of it, throughout the Union, are expected to give their vote accordingly, at the formal and actual election

for President, on the day appointed by Congress for that ceremony.

Thus the whole numerical force of each party is directed in favour of one candidate, and the probability is that, when the votes come to be opened by Congress, the individual at the head of the poll will be found to have the required majority of the whole number voting, and therefore will be duly elected, and the necessity accordingly obviated of calling in the aid of the House of Representatives.

But the consequence of this system is, that, so far from the electors bringing to bear "their information, discernment, and independence" upon the selection of a President, as is expected of them by the Constitution, it occasionally happens that they are required to give, and do give, their votes, in a body, for an individual, to be elected by them as President, whose name, as a politician, they may have scarcely ever heard of, and of whose qualifications for that high office they know absolutely nothing; and this after having

expended many months' exertions, and manifested the highest degree of interest, in favour of one or more of the most distinguished men in the Union belonging to their side of politics.

This system is denounced very loudly by many able and patriotic persons in the United States. It is asserted that its effect is to throw the whole business of "President-making" into the hands of professional politicians, who make it a regular "trade," and live by its results. It is a system also that has gained rapidly upon all the very numerous elections throughout the whole country, from that of the smallest and most unimportant office in the counties, cities, and towns, through the various gradations of State and national representatives, up to the President of the Union. It has, therefore, become a common mode of expression, that "the people" have in reality very little to do practically with any of these elections, but that they are "wire-pulled" by the individuals who make it their business to manage them.

The last presidential election afforded a complete illustration of this process.

The candidates on the democratic side were no less than eight: General Cass, Mr. Buchanan, Mr. Douglas, Mr. Marcy, Mr. Butler, Mr. Houston, Mr. Lane, and Mr. Dickenson; all men "prominently known to their party," and the three first supported with great enthusiasm by large sections of that party throughout the Union.

The Convention appointed by the democratic party in each State to decide which among these various candidates should be recommended for their votes at the election, assembled at Baltimore for their first meeting on the 1st of June, 1852. On that day General Cass obtained the greatest number of votes at the first ballot, namely 116, out of the total of 288; but a number far below the requisite majority. A few specimens of the manner in which the votes fluctuated will not be without interest. On the ninth ballot the votes were —Cass, 112; Buchanan, 87; Douglas, 39;

Marcy, 28; Butler, 1; Houston, 8; Lane, 13; Dickenson, 1. On the twenty-second ballot—Cass, 33; Douglas, 80; Butler, 24; Lane, 13; Buchanan, 101; Marcy, 25; Houston, 10; Dickenson, 1. On the twenty-ninth ballot—Cass, 27. On the thirty-fifth ballot—Cass, 131; Douglas, 52; Buchanan, 32.

On this, the sixth day of the meeting (the proceedings of and the scenes in which were fully and somewhat graphically described by the public press of both parties), a new name appeared for the first time upon the lists—that of Mr. Pierce, of New Hampshire, a gentleman well known to his friends as a lawyer of ability; also as having creditably fulfilled the duties of a member of the House of Representatives, and of the Senate of the United States; better known, however, as having joined the army as a volunteer on the breaking out of the Mexican war, and as having commanded with distinction a brigade in that war, with the rank of General. It will, nevertheless, imply no

disrespect towards Mr. Pierce, if I repeat what was the universal expression, according to the public prints, throughout the Union, that no individual in the United States could have been more surprised at Mr. Pierce's nomination for the exalted and responsible office of chief magistrate of the Republic than Mr. Pierce himself. On the thirty-fifth ballot, the first in which Mr. Pierce's name appeared, he received 15 votes. On the forty-eighth, he received only 55 votes; but on the forty-ninth, the numbers voting for him were 283, out of the total of 288—a vote which 5 more would have made unanimous.

Mr. Pierce was accordingly recommended to the democratic constituencies throughout the Union, and was elected by a considerable majority over his Whig opponent; the numbers being, for Mr. Pierce 1,504,471, and for General Scott 1,283,174.

The circumstance particularly to be noted in the whole of this proceeding in relation to the Constitution of the United States is, that whereas, according to the theory of that Con-

stitution, certain electors nominated by the people of the United States are required to exercise their best judgment and discretion in selecting the person best qualified to fill the high and important post of President, in this case neither the electors nor the people of the United States can be said to have had anything more to do with the election than merely to record their votes, in compliance with the decision of the Convention, which Convention had been nominated by them to decide between certain known and popular candidates. Not being able to agree among themselves in favour of any one of those candidates, the members of the Convention took upon themselves to bring forward a new one; a gentleman whose name had never until then been heard of in such a manner as in the remotest degree to entitle him to anticipate such an honour, but who was, nevertheless, at once exalted to the first place in the Republic.

If the surprise was great at this nomination, the unanimity with which it was accepted was not less, and was, if possible, surpassed by

the favourable anticipations that were announced throughout the Union, as justified by the abilities, the character, and the decided democratic opinions and principles of the new candidate for the Presidency. The democratic party of every shade, from the most moderate to the most exalted, voted for him, and claimed him as the exponent of their principles.

And as the democratic party is now without comparison the strongest in the United States, it may be asserted that no President ever entered upon office possessed of a higher degree of popularity, whether expressed in the number of votes he had received, or in the support and encouragement of the organs of public opinion.

It is now but little more than eight months since Mr. Pierce's election, and he is now assailed, by a very large proportion of his former supporters, with a violence as great as their former enthusiasm in his favour.

The reason is not disguised, or attempted to be. The original candidates who were brought forward at the Convention were, as has been stated, eight in number, each representing some

section of the democratic party throughout the Union. If any one of those eight had been nominated for President by the Convention, his supporters would, according to known custom, have felt themselves entitled to a preference in appointments to all the offices at the President's disposal, whether those of the principal members of his administration, or the inferior ones in each State, within the gift of the President. The Convention being so much divided, no one party was willing to give this victory to either of the others. Accordingly, an entirely new candidate was proposed, previously unnamed, and, for aught that appeared, unthought of, and consequently totally unpledged to any. This gentleman was accepted by all, and made President of the United States.

But having been elected by all, by a vote almost unanimous in the Convention, and by the joint efforts of the various sections of his own party throughout the country, Mr. Pierce, has, since his election, proceeded to offer his patronage to, and to distri-

bute it among, persons belonging to those various sections; and in some instances, not feeling himself restricted, in the choice of persons whom he deemed capable of filling responsible offices, to one section of opinion only, he is said to have gone beyond the limit of his own party connections in the selection of such persons. For this, and for a "vacillating policy" which it is supposed to have led to, he has been denounced by influential portions of the democratic press; and he is told with great vehemence, that nothing but some bold stroke of policy can restore him to his former popularity.

Now, in the fact last adverted to lies, to a great extent, the instruction which is to be derived from a comparison of the system of the United States with our own, in reference to the Executive power of the State.

If a President of the United States is capable and ambitious, he must necessarily wish to be re-elected at the expiration of his four years of office. To be re-elected he must be popular; and to be popular, it is possible that it may be

necessary for him to adopt a line of policy which, to say the least, may be "disquieting" to, if it does not actually produce collision with, some of the other powers of the world in defence of their rights and interests.

In his inaugural address, delivered at Washington in March, 1853, some of the principles announced by Mr. Pierce, as those that were to be the basis of his foreign policy, were in strict accordance with the doctrines of the ultra-democratic section of his supporters. Mr. Pierce stated on that occasion, "that it is not to be disguised that the attitude of the United States as a nation, and its position on the globe, rendered *the acquisition of certain possessions not within the jurisdiction of the United States* eminently important for their protection, if not in the future essential for the preservation of the rights of commerce and the peace of the world." And the principle was avowed as "fundamental," that "the rights, security, and repose of this Continent reject the idea of *interference* or colonization on this side of the Ocean by any *foreign power, be-*

yond its present jurisdiction, as utterly inadmissible."

It is possible, and it is to be hoped "for the sake of the peace of the world" that it may be probable, that doctrines so menacing in their assertion may not be found so easy of being carried out into action. It is impossible to mistake their purport. They point to the acquisition of Cuba; and their plain meaning is, that neither Great Britain, nor France, nor any of the other friendly States interested in the present distribution of power in the West Indies and along the eastern coast of North America, would have a right to interfere to prevent the island of Cuba from passing from the hands of Spain to those of the United States, by cession, or purchase, or by any other means within the power of the United States to bring about.

Fortunately, the despatch of Lord John Russell, already referred to, has placed on record the opinion of the Government of Great Britain upon this subject. And we may accordingly rest secure that "the peace of the

world" will be best maintained by a course of action on the part of the people of the United States, in accordance with the principles promulgated in that document.

These considerations are of the more importance, because a strong indication has been given by the President of the United States to act, if possible, upon the policy enunciated in his address above-mentioned.

He has appointed, as Minister of the United States to the Court of Madrid, Mr. Soulé, a member of the most advanced section of the democratic party, and a gentleman who has taken a very conspicuous part in the agitation in favour of adding Cuba to the possessions of the United States. The proposition to acquire it from Spain by purchase has found much favour with that party; and, although the suggestion has been once indignantly rejected by the Spanish Government, the well-known necessities of that Government, coupled with the fact of the large sum of £6,000,000 sterling, or thereabouts (about 30,000,000 of dollars), having accumulated from surplus

revenue, and now lying idle in the coffers of the Treasury of the United States, have encouraged the revival of the proposal, which there can be little doubt that Mr. Soulé will endeavour to renew to the Spanish Ministry. The addresses received by Mr. Soulé, from his political friends, on the eve of his leaving New York, and his answers to them, sufficiently indicated what was expected of him, and the object to which his endeavours would be directed.

The "bold stroke of policy," therefore, which may restore the popularity of the President and reunite his party, may possibly be soon revealed to the world.

Happily for the repose, the dignity, the credit of this country, the Executive is exposed to no such temptations as have been above described. Even the most popular minister, enjoying the most unbounded confidence of Parliament, and wielding all the constitutional powers entrusted to him by the Crown, could take no more effectual course to destroy his popularity in a day, than to propose, on the

one hand, to weaken still more an enfeebled ally, and, on the other, to deny the right of all other powers, who would be affected by such an act, to interfere. That the Crown or a minister should have recourse to such a line of policy with the view to acquire popularity, or to restore it, is an impossible supposition in this country.

In relation to the above subject, the manner in which the power to make treaties is arranged by the Constitution of the United States, is of some significance. This (by the 2nd sect. of the 2nd article, clause 2) is committed to the President, "by and with the consent of two-thirds of the senators present."

Upon this Mr. Justice Story remarks that—

"Accurate knowledge of foreign politics, a steady and systematic adherence to the same views, nice and uniform sensibility to national character, as well as secrecy, decision, and despatch, are required for a due execution of the power to make treaties."*

And, accordingly, as the Senate "may be fairly presumed at all times to contain a very

* § 1516.

large portion of talents, experience, political wisdom, and sincere patriotism, a spirit of liberality, and a deep devotion to all the substantial interests of the country," the constitutional check of requiring two-thirds of that body to confirm a treaty will be found to be "a sufficient guarantee against any wanton sacrifice of private rights, or any betrayal of public privileges."*

Mr. Justice Story further thinks that—

"However safe it may be in Governments where the executive magistrate is an hereditary monarch, to commit to him the entire power of making treaties, it would be utterly unsafe and improper to entrust that power to an executive magistrate chosen for four years. It has been remarked, and is unquestionably true, that an hereditary monarch, though often the oppressor of his people,† has personally too much at stake in the Government to be in any material danger of corruption by foreign powers, so as to surrender any important rights or interests. But a man raised from a private station to the rank of chief magistrate for a short period, having but a slender and moderate fortune, and no very deep stake in the society, might sometimes be under temptations to sacrifice duty to interest,

* § 1513.

† Mr. Justice Story probably alluded to events in English history, a century and a half old, or to some of the absolute monarchies of the continent of Europe.

which it would require great virtue to withstand. If ambitious, he might be tempted to seek his own aggrandisement by the aid of a foreign power, and use the field of negotiation for the purpose. If avaricious, he might make his treachery to his constituents a vendible article at an enormous price. Although such occurrences are not ordinarily to be expected, yet the history of human conduct does not warrant that exalted opinion of human nature which would make it wise in a nation to commit its most delicate interests and momentous concerns to the unrestrained disposal of a single magistrate. It is far more wise to interpose checks upon the actual exercise of the power, than remedies to redress and punish an abuse of it."*

The vast patronage in the hands of the President of the United States, and the manner in which, immediately after each presidential election, it has, according to recent usage, been exercised, are circumstances which create some of the most marked distinctions between the position and power of the President, and that of the Executive of this country.

By the clause of the Constitution last quoted,† the President is empowered to nominate, and by and with the consent of the Senate to appoint ambassadors, other public

* § 1515. † Article 2, section 2.

ministers and consuls, judges of the supreme court, and all other officers of the United States whose appointments are not otherwise provided for.

Mr. Justice Story thus describes the extent of the patronage assigned to the President:—

"The power of Congress has been exerted to a great extent, under this clause, in favour of the executive department. The President is by law invested, either solely or with the Senate, with the appointment of all military and naval officers, and of the most important civil officers, and especially those connected with the administration of justice, the collection of the revenue, and the supplies and expenditure of the nation. The courts of the Union possess the narrow prerogative of appointing their own clerk and reporter, without further patronage. The heads of departments are in like manner generally entitled to the appointment of the clerks in their respective offices. But the great anomaly of the system is the enormous patronage of the Postmaster-general, who is invested with the sole and exclusive authority to appoint and remove all deputy-postmasters; and whose power and influence have thus, by slow degrees, accumulated, until it is, perhaps, not too much to say that it rivals, if it does not exceed in value and extent, that of the President himself."*

* § 1536. The Postmaster-general, in his Report of 1st December, 1853, states that "the whole number of post offices in the United States at that date was 22,688.

And with regard to the "inferior offices," the patronage of which is exclusively in the President, Mr. Justice Story asserts, that they "probably include ninety-nine out of every hundred of the lucrative offices of the Government."

It was argued, when the Constitution was under discussion, that the Executive would be materially weakened by being compelled to share with the Senate the power of appointment to the principal offices; but the contrary apprehension, that of the Executive becoming too powerful if possessed exclusively of the whole patronage of the Government, prevailed. And with regard to the inferior offices, it was urged that a President, acting under the eye of the public, would not venture to make his patronage subservient to party interests, but would distribute it with a view to the highest purposes of the public good. On this subject Mr. Justice Story observes: *—

"Perhaps the duties of the President, in the discharge of this most delicate and important duty of his office, were

* § 1533.

never better summed up than in the following language of a distinguished commentator.* 'A proper selection and appointment of subordinate officers is one of the strongest marks of a powerful mind. It is a duty of the President to acquire, as far as possible, an intimate knowledge of the capacities and character of his fellow-citizens; to disregard the importunities of friends, the hints and menaces of enemies, the bias of party, and the hope of popularity. The latter is sometimes the refuge of feeble-minded men; but its gleam is transient, if it is obtained by a dereliction of honest duty and sound discretion. Popular favour is best secured by carefully ascertaining, and strictly pursuing the true interests of the people. The President himself is elected on the supposition that he is the most capable citizen to understand and promote those interests; and in every appointment he ought to consider himself as executing a public trust of the same nature. Neither should the fear of giving offence to the public, or pain to the individual, deter him from the immediate exercise of his power of removal, on proof of incapacity or infidelity in the subordinate officer. The public, uninformed of the necessity, may be surprised, and at first dissatisfied; but public approbation ultimately accompanies the fearless and upright discharge of duty.'"

The extent of the patronage vested in the President being as described in the former paragraph, the manner in which it is exercised, especially in reference to the removal

* Rawle on the Constitution, c. 14, p. 164.

of persons appointed by a preceding President, becomes a question of the most serious import.

The question whether the consent of the Senate was necessary to the removal of a person from office as well as to his appointment thereto, was warmly debated at the time of the framing of the Constitution. The writers of the Federalist adopted the view that no removal from office could be lawfully made without the concurrence of the Senate. "The maintenance of this doctrine with great earnestness by the Federalist," says Mr. Justice Story,—

"Had a most material tendency to quiet the just alarms of the overwhelming influence and arbitrary exercise of this prerogative of the Executive, which might prove fatal to the personal independence and freedom of opinion of public officers, as well as to the public liberties of the country. Indeed it is utterly impossible not to feel that if this unlimited power of removal does exist, it may be made, in the hands of a bold and designing man, of high ambition and feeble principles, an instrument of the worst oppression and most vindictive vengeance. Even in monarchies, while the councils of State are subject to perpetual fluctuations and changes, the ordinary officers of the Government

are permitted to remain in the silent possession of their offices, undisturbed by the policy or the passions of the favourites of the court. But in a republic, where freedom of opinion and action are guaranteed by the very first principles of the Government, if a successful party may first elevate their candidate to office, and then make him the instrument of their resentments or their mercenary bargains; if men may be made spies upon the actions of their neighbours to displace them from office; or if fawning sycophants upon the popular leader of the day may gain his patronage, to the exclusion of worthier and abler men—it is most manifest that elections will be corrupted at their very source, and those who seek office will have every motive to delude and deceive the people. It was not, therefore, without reason that, in the animated discussions already alluded to, it was urged that the power of removal was incident to the power of appointment; that it would be a most unjustifiable construction of the Constitution, and of its implied powers to hold otherwise; that such a prerogative in the Executive was in its own nature monarchical and arbitrary, and eminently dangerous to the best interests as well as the liberties of the country. It would convert all the officers of the country into the mere tools and creatures of the President. A dependence so servile on one individual would deter men of high and honourable minds from engaging in the public service. And if, contrary to expectation, such men should be brought into office, they would be reduced to the necessity of sacrificing every principle of independence to the will of the chief magistrate, or of exposing themselves to the disgrace of being removed from office, and that, too, at a time when it might

no longer be in their power to engage in other pursuits." . . . . "The language of the Federalist is, that the consent of the Senate would be necessary to displace as well as to appoint.* A change in the chief magistrate, therefore, could not occasion so violent or so general a revolution in the officers of the Government as might be expected if he were the sole disposer of offices. Where a man in any station had given satisfactory evidence of his fitness for it, a new President would be restrained from attempting a change in favour of a person more agreeable to him, by the apprehension that the discountenance of the Senate might frustrate the attempt, and bring some degree of discredit upon himself." . . . . "On the other hand, those who, after the adoption of the Constitution, held the doctrine (for before that period it never appears to have been avowed by any of its friends, although it was urged by its opponents as a reason for rejecting it), that the power of removal belonged to the President, argued that it resulted from the nature of the power, and was indispensable for a due execution of the laws, and a regular administration of the public affairs." . . . "Besides, it was argued, that the danger that a President would remove good men from office was wholly imaginary. It was not by the splendour attached to the character of a particular President like Washington that such an opinion was to be maintained. It was founded on the structure of the office. The man in whose favour the majority of the people of the United States would unite to elect him to such an office, had every probability at least in favour of his principles. He must be presumed to possess integrity, independence,

* Federalist, No. 77.

and high talents. It would be impossible that he should abuse the patronage of the Government, or his power of removal, to the base purposes of gratifying a party, or of ministering to his own resentments, or of displacing upright and excellent officers, for a mere difference of opinion. The public odium which would inevitably attach to such conduct would be a perfect security against it. And, in truth, removals made from such motives, or with a view to bestow the offices upon dependents or favourites would be an impeachable offence. One of the most distinguished framers of the Constitution (Mr. Madison), on that occasion, after having expressed his opinion decidedly in favour of the existence of the power of removal in the Executive, added, 'In the first place he will be impeachable by the House of Representatives before the Senate for such an act of mal-administration; for I contend that the wanton removal of meritorious officers would subject him to impeachment, and removal from his high trust.'"*

That the event has proved entirely contrary to the lofty and patriotic anticipations of the framers of the Constitution will be presently shown. It is first necessary to notice the remarkable fact, that the decision of Congress, admitting this exclusive right of dismissal to be in the President, was only carried by a bare majority.†

* Story, §§ 1539, 1540.

† Senate Journal, July 18, 1789, p. 42. Story, § 1543.

Mr Justice Story thus records it:—

"After a most animated discussion, the vote finally taken in the House of Representatives was affirmative of the power of removal in the President, without any co-operation of the Senate, by the vote of thirty-four members against twenty. In the Senate the clause of the bill affirming the power, was carried by the casting vote of the vice-president.

"That the final decision of this question so made was greatly influenced by the exalted character of the President then in office, was asserted at the time, and has always been believed. Yet the doctrine was opposed, as well as supported, by the highest talents and patriotism of the country. The public, however, acquiesced in the decision; and it constitutes, perhaps, the most extraordinary case in the history of the Government, of a power conferred by implication on the Executive by the assent of a bare majority of Congress." *

This power remained for some time unquestioned; and "even the most zealous advocates of State rights seem to have slumbered over this vast reach of authority.* Nor," says Mr. Justice Story, "is this general acquiescence and silence without a satisfactory explanation."

"Until a very recent period the power had been exercised in few cases, and generally in such as led to their

* §§ 1542, 1543.

own vindication. During the administration of President Washington few removals were made, and none without cause. Few were made in that of the first President Adams. In that of President Jefferson the circle was greatly enlarged; but yet it was kept within narrow bounds, and with an express disclaimer of the right to remove for differences of opinion, or otherwise than for some clear public good. In the administration of the subsequent Presidents, Madison, Munroe, and John Quincy Adams, a general moderation and forbearance were exercised, with the approbation of the country, and without disturbing the harmony of the system.

"Since the induction into office of President Jackson (4th March, 1829), an opposite course has been pursued; and a system of removals and new appointments to office has been pursued so extensively, that it has reached a very large proportion of all the offices of honour and profit in the civil departments of the country. This is a matter of fact; and beyond the statement of the fact, it is not the intention of the commentator to proceed. This extraordinary change of system has awakened general attention, and brought back the whole controversy, with regard to the executive power of removal, to a severe scrutiny." *

The facts given by Mr. Justice Story, showing the extent of the removals from office by President Jackson, are as follows:—

"In proof of this statement, lest it should be ques-

* §§ 1542, 1543.

tioned, it is proper to say, that a list of removals (confessedly imperfect), between the 4th of March, 1829, when President Jackson came into office, and the 4th of March, 1830, has been published, by which it appears, that, during that period, there were removed eight persons in the diplomatic corps; thirty-six in the executive departments; and in the other civil departments, including consuls, marshals, district attorneys, collectors and other officers of the customs, registers and receivers, one hundred and ninety-nine persons. These officers include a very large proportion of all the most lucrative offices under the national Government. Besides these, there were removals in the post-office department, during the same period, of four hundred and ninety-one persons.* This statement will be found in the *National Intelligencer* of 27th September, 1832, with the names of the parties, except postmasters; and I am not aware that it has ever been denied to be correct. It is impossible for me to vouch for its entire accuracy. It is not probable that from the first organisation of the Government, in 1789, down to 1829, the aggregate of all the removals made amounted to one-third of this number. In President Washington's administration of eight years, only nine removals took place."†

President Tyler, in his address to Congress of 1841, declared that he would remove no one

* See Mr. Postmaster-general Barry's Report of 24th March, 1830.

† Note to § 1543.

from office except for incapacity, misconduct, *or interference with politics;* and in 1842 he proposed to "regulate and restrain" the power of the President "to remove public officers; since that power acts as a stimulus to office-holders and office-hunters at elections." The Presidents belonging to the Whig party appear generally to have discouraged this practice; but in the seventeen years that have elapsed since the end of President Jackson's administration, these "wholesale removals," as they are now commonly called, have, according to common report, been of frequent occurrence. The public prints of the United States speak of offices "by the hundred" having been given away by the present President, in the short period since his election; and their complaint is, not of the displacing of the previous holders, but of their places not having been supplied from the main body of the partisans of the President, who loudly assert the injustice done to them, and visit it upon the President, with the strongest accusations of imbecility in his personal character and public policy.

The injury done to the public service by this system can admit of no dispute. But the point which is of general concern and interest, in a review of the working of the Constitution of the United States, is, the strange and flagrant departure, exhibited by this practice, from that which was regarded by the whole body of the enlightened and patriotic framers of the Constitution, as so fundamental a principle, and so essential to the interests and even liberties of the community, that they could conceive no other remedy for it, if it should by possibility, and contrary to all their expectations, exist, than the impeachment of the President, who should so far violate the spirit of their institutions as to lend himself to it.*

* The practice is receiving an illustration at present which is exciting some notice in the United States. The President has dismissed Mr. G. C. Bronson (formerly a judge, and still usually addressed as Judge Bronson) from his office of Collector of New York, on the ground of his being a political opponent. Judge Bronson, in a very temperate letter addressed to the "Washington Sentinel," and dated New York, October 26, 1853, denies the imputation, and states that he does not entertain, and never did entertain the opinions imputed to him by Mr. Secretary Davis and the President. The

Democratic party, however, support the President. The following announcement is an indication of their sentiments:—

"THE DEMOCRATS OF MASSACHUSETTS, ON COLLECTOR BRONSON'S REMOVAL.

"Boston, Oct. 28, 1853.

"At the Democratic Convention of Plymouth County yesterday, it was resolved that the removal of the Collector of New York, when he attempted to disregard the principles of the union of the Democratic party, deserves, and will receive, the support of all true friends of Democratic principles."

CHAPTER XV.

THE JUDICIARY.

THE Constitution of the United States being a written one, and defining, in certain terms, the rights and duties of all who live under it, it is a matter of necessity that there should be a power, lodged somewhere, of interpreting those terms, and declaring whether or not in any particular case they have been violated.

This power has been placed, by the Constitution, in the judiciary of the United States.

This body, therefore, is invested with an authority which cannot fail to appear to English eyes to be of a very extraordinary character, namely, that of declaring void and of none effect, an Act solemnly passed by the

Legislature, should that Act be, in their opinion, at variance with the Constitution.*

Our system of government, which is founded partly on usage and partly on Acts of Parliament, neither knows, nor requires, nor would tolerate, any authority extraneous to that of the Legislature, when the will of the Legislature has been once declared by a formal Act. The decision of Parliament becomes the supreme law of the land, which all are bound to obey, and to which all submit, as the matured result of public opinion, and of the deliberations of the representatives of the whole community, in both Houses of Parliament. We entrust to Parliament the power of altering the laws and modifying our institutions from time to time, as occasion may arise, and the demands of the day may require; and we so entrust it, in the confidence that enlightened public opinion will at all times be

* "It is an important principle, and never to be lost sight of, that the judiciary in this country is not a subordinate, but a *co-ordinate*, branch of the Government."—Judgment of Mr. Justice Patterson. Dallas's Reports, vol. ii. p. 309. Philadelphia, 1798.

sufficient to prevent the abuse of that power, or to check and correct it.

But the system of government of the United States having, unlike ours, been strictly defined in a written document, and formally assented to, after being submitted to the suffrages of the electors throughout the whole of the States, and having thus been recognised as "the Supreme Law of the land," all other laws that might be made contrary to it, either by Congress or by any one of the States, must necessarily be void; and there must be some means of deciding what laws are of that nature, and thereupon declaring them void accordingly. Considering also the extent of the Union, and that it is composed of an assemblage of republics, each having its own judicature, it was essential, in order to prevent collisions between the laws and powers of the Union and those of the States, that there should be "some superintending judiciary establishment," without which there could be no uniform administration or interpretation of the laws of the Union.

Mr. Justice Story places the matter in the following point of view :—

"As the Constitution is the supreme law of the land, in a conflict between that and the laws either of Congress or of the States, it becomes the duty of the judiciary to follow that only which is of paramount obligation. This results from the very theory of a republican form of government, for otherwise the acts of the Legislature and Executive would in effect become supreme and uncontrollable, notwithstanding any prohibitions or limitations contained in the Constitution; and usurpations of the most unequivocally dangerous character might be assumed, without any remedy within the reach of the citizens. The people would thus be at the mercy of their rulers in the State and National Governments, and an omnipotence would practically exist like that claimed for the British Parliament. The universal sense of America has decided that, in the last resort, the judiciary must decide upon the constitutionality of the acts and laws of the general and State Governments, so far as they are capable of being made the subject of judicial controversy. It follows, that when they are subjected to the cognisance of the judiciary, its judgments must be conclusive, for otherwise they may be disregarded, and the acts of the Legislature and Executive enjoy a secure and irresistible triumph. To the people at large, therefore, such an institution is peculiarly valuable, and ought to be eminently cherished by them. . .

"The framers of the Constitution, having these great principles in view, adopted two fundamental rules with

entire unanimity—first, that a national judiciary ought to be established; secondly, that it ought to possess powers co-extensive with those of the legislative department. Indeed, the latter necessarily flowed from the former, and was treated, and must always be treated [under the system of the United States], as an axiom of political government. But these provisions alone would not be sufficient to ensure a complete administration of public justice, or to give permanency to the Republic. The judiciary must be so organised as to carry into complete effect all the purposes of its establishment. It must possess wisdom, learning, integrity, independence, and firmness. It must at once possess the power and the means to check usurpation, and enforce execution of its judgments."*

Such being the motives which actuated the framers of the Constitution of the United States in assigning to the judiciary its powers, and such being the duties expected of them, it is next to be seen "how far adequate means are provided for all these important purposes."

The first section of the third Article of the Constitution is as follows:—

"The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as Congress may from time to time ordain and establish. The

* §§ 1576, 1577.

judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office."

And by section 2, clause 1, their jurisdiction is thus defined :—

"The judicial power shall extend to all cases, in law and equity, arising under the Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State, claiming lands under grants of different States; and between a State, or the citizens thereof, and foreign States, citizens, or subjects."*

The Supreme Court consists of seven judges, and by clause 2 of the second section, they are invested with original jurisdiction "in all cases affecting ambassadors, other public mi-

* This clause was subsequently altered by Article 11 of the Amendments of the Constitution, which is as follows :—"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

nisters, and consuls, and those in which a State shall be party," and "in all the other cases before mentioned, with appellate jurisdiction," with such exceptions as Congress may think proper to make.

The inferior courts of the United States, to which the first section refers, are Circuit Courts, of which the judges of the Supreme Court are also the judges (the whole Union being divided into circuits), and the District Courts, one at least of which is established in every State.

These two courts have original jurisdiction in the cases specified in the above article, and also, as well as the Supreme Court, appellate jurisdiction in respect to cases within their judicial cognisance which may have arisen in the State courts; the obvious motive for which was, "the importance, and even the necessity, of uniformity of decisions throughout the whole of the United States upon all subjects within the purview of the Constitution."*

* Story, §§ 1590–1597.

Whether it was in accordance with the Constitution, that the judges of the Supreme Court should also be called upon to fulfil the duties of judges of the circuit courts, was questioned in an elaborate memorial presented to President Washington, within a year after the Constitution was established, by Chief Justice Jay and the other judges of the Supreme Court. But no change was made; and when the question was raised in 1803 before the Supreme Court, it was decided that the practice up to that time should be taken to have decided the point in favour of its being within the intention of the Constitution.*

The mode of appointing to these high judicial offices is obviously a matter of the first importance, in relation to the qualifications, and to the independence, of the functionaries invested with them.

* Note to § 1579. The two great cases which have decided the extent of the appellate jurisdiction of the United States Courts are Martin *v.* Hunter, 1 Wheatstone's Reports, 304; and Cohens *v.* Virginia, 6 Wheat., 413 to 423.

The President is, by the Constitution,* authorised to nominate, and, by and with the advice and consent of the Senate, to appoint the judges of the Supreme Court.

The appointment of the judges of the inferior courts is not expressly provided for by the Constitution, and Congress have passed no Act to regulate it. It has, therefore, according to Mr. Justice Story, been considered "silently to belong to the President, under the clause of the Constitution authorising him to appoint all other officers of the United States whose appointments are not therein otherwise provided for."†

Not inferior in the importance of its results upon the weight and character of the judicial body, is the tenure by which they hold their offices; and there is no point upon which the able commentators on the Constitution—Story, Kent, Rawle, and Tucker, have bestowed more pains than this, in their endeavours to

* Article 2, section 2, c. 2.

† § 1599.

impress upon their fellow-citizens the convictions which they themselves so deeply felt, that a secure and independent tenure of the judicial office is one of the cardinal points on which their Constitution, their liberties, and even the individual safety of life and property, must always in a great degree depend.

With regard to the tenure of office of the judges of the Supreme Court there is no question. They are appointed during good behaviour, by the President, in conjunction with the Senate. The practice has been in accordance with the hitherto-accepted theory, namely, that they cannot be removed, except after conviction upon impeachment for misconduct.

But the judges of the inferior courts, although also appointed during good behaviour (which the law of the United States interprets to mean for life, in accordance with the decision of Chief Justice Holt upon the subject, which is the foundation of the interpretation of these words in our courts)* do not

* 1 Shower's Reports, 426. 506. 536.

stand, in regard to the permanence of their appointments, upon the same secure footing of precedent as their brethren of the Supreme Court.*

Upon this subject, Mr. Justice Story comments as follows:—

"Unfortunately, a measure was adopted in 1802, under the auspices of President Jefferson, which, if its constitutionality can be successfully vindicated, prostrates in the dust the independence of all inferior judges, both as to the tenure of their office and their compensation for services, and leaves the Constitution a miserable and vain delusion. In the year 1801, Congress passed an Act reorganising the judiciary, and authorising the appointment of sixteen new judges, with suitable salaries, to hold the circuit courts of the United States in the different circuits created by the Act. Under this Act the circuit judges received their appointments and performed the duties of their offices until the year 1802, when the courts established by the Act were abolished by a general repeal of it by Congress, without in the slightest manner providing for the payment of the salaries of the judges, or for any continuation of their offices. The result of this Act, therefore, is, (so far as it is a precedent,) that, notwithstanding the constitutional tenure of office of the judges of the inferior courts is during good behaviour, Congress may at any time, by a mere act of legislation, deprive

* Story, §§ 1600–1627.

them of their offices at pleasure, and with it take away their whole title to their salaries. How this can be reconciled with the terms or the intent of the Constitution is more than any ingenuity of argument has ever as yet been able to demonstrate. The system fell because it was unpopular with those who were then in possession of power; and the victims have hitherto remained without any indemnity from the justice of the Government.

"Upon this subject a learned commentator* has spoken with a manliness and freedom worthy of himself and of his country. To those who are alive to the just interpretation of the Constitution—those who, on the one side, are anxious to guard it against usurpations of power injurious to the States; and those who, on the other side, are equally anxious to prevent a prostration of any of its great departments to the authority of the others—the language can never be unseasonable, either for admonition or instruction, to warn us of the facility with which public opinion may be persuaded to yield up some of the barriers of the Constitution under temporary influences; and to teach us the duty of an unsleeping vigilance to protect that branch which, though weak in its powers, is yet the guardian of the rights and liberties of the people. 'It was supposed,' says the learned author, 'that there could not be a doubt that those tribunals in which justice is to be dispensed according to the Constitution and laws of the confederacy—in which life, liberty, and property are to be decided upon—on which questions might arise as to the

* Tucker's Blackstone's Commentaries, vol. i. App. 360; 3 App. 22–25.

constitutional power of the Executive, or the constitutional obligations of an Act of the Legislature, and in the decision of which the judges might find themselves constrained by duty and by their oaths to pronounce against the authority of either—should be stable and permanent, and not dependent upon the will of the Executive or Legislature, or both, for their existence; and that without this degree of permanence, the tenure of office during good behaviour could not secure to that department the necessary firmness to meet unshaken every question, and to decide as justice and the Constitution should dictate, without regard to consequences. These considerations induced an opinion, which it was presumed was general, if not universal, that the power vested in Congress to erect, from time to time, tribunals inferior to the Supreme Court, did not authorise them at pleasure to demolish them. Being built upon the rock of the Constitution, their foundations were supposed to partake of its permanency, and to be equally incapable of being shaken by the other branches of the Government. But a different construction of the Constitution has lately prevailed. It has been determined that a power to ordain and establish from time to time, carries with it a discretionary power to discontinue or demolish; that although the tenure of office be "during good behaviour," this does not prevent the separation of the office from the officer, by putting down the office, but only secures to the officer his station, upon the terms of good behaviour, so long as the office itself remains. Painful, indeed, is the remark, that this interpretation seems calculated to subvert one of the fundamental pillars of free Governments, and to have laid the foundation of one of the most dangerous political

schisms that has ever appeared in the United States of America.'"*

And in another passage, representing the illegality of the above Act of the Legislature, Mr. Justice Story rightly insists that—

"Until the people have by some solemn and authoritative act annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it prior to such an act."

It cannot be doubted that the tendency of such a step on the part of the Legislature, in reference to the judges of the inferior courts of the United States, must have been to loosen the feeling of permanency with regard also to the tenure of office by the judges of the Supreme Court; and, accordingly, Mr. Justice Story adverts to the fact that President Jefferson,

"During the latter years of his life, and indeed from the time when he became President of the United States, was a most strenuous advocate of the plan of making the judges hold their offices for a limited term of years only.

* Story, § 1634.

He proposed that their appointments should be for four or six years, renewable by the President and the Senate."*

He also observes that—

"Surely it will not be pretended that any Constitution adapted to the American people could ever contemplate the executive and legislative departments of the Government as the ultimate depositaries of the power to interpret the Constitution, or as the ultimate representatives of the will of the people, to change it at pleasure. If, then, the judges were appointed for two, or four, or six years, instead of during good behaviour, the only security which the people would have for a due administration of public justice, and a firm support of the Constitution, would be, that, being dependent upon the Executive for their appointment during their brief tenure of office, they might, and would, represent more fully, for the time being, the constitutional opinion of each successive Executive, and thus carry into effect his system of government. Would this be more wise, or more safe, more for the permanence of the Constitution, or the preservation of the liberties of the people, than the present system? Would the judiciary then be, in fact, an independent, co-ordinate department? Would it protect the people against an ambitious or corrupt Executive, or restrain the Legislature from acts of unconstitutional authority?"†

The opinions of President Jefferson, in 1801, were revived in 1829 by President Jackson, who, in his inaugural address for that year,

* § 1618, note. † § 1618.

recommends the general extension of the law which limits appointments for four years; a recommendation which he repeated in his address of 1832.

The adoption of the principle of appointing their judges for terms of years, in some States by the electoral body, in others by the Legislature, which, as I shall presently show, has of late years made considerable progress among the individual States, makes it desirable that I should illustrate the opinions of the framers of the Constitution, and of other learned persons upon this particular point, by a few more extracts; more especially as the growing departure from principles which those distinguished persons endeavoured to sustain with so much argument and eloquence, must in all probability produce by degrees very perceptible effects upon the judiciary of the United States.

"Upon this subject," says Mr. Justice Story, "the 'Federalist' has spoken with so much clearness and force, that little can be added to its reasoning. The standard of good behaviour, for the continuance in office of the judicial magistracy, is certainly one of the most valuable

of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient that can be devised in any government, to secure a steady, upright, and impartial administration of the laws. Whoever attentively considers the different departments of power, must perceive that in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution, because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honours, but holds the sword of the community. The Legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may be truly said to have neither force nor will, but merely judgment; and must ultimately depend upon the aid of the executive arm for the efficacious exercise even of this faculty.

"This simple view of the matter suggests several important consequences. It proves incontestibly that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves, that although individual oppression may

now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter. I mean, so long as the judiciary remains truly distinct from both the Legislature and the Executive. For I agree that 'there is no liberty if the power of judging be not separated from the legislative and executive powers.' It proves in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments; that as all the effects of such an union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as, from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches; that as nothing can contribute so much to its firmness and independence as *permanency in office*,* this quality may, therefore, be justly regarded as an indispensable ingredient in its constitution, and in a great measure as the *citadel** of the public justice and the public security."†

Other considerations are urged by Mr. Justice Story, from this and other authorities, not less weighty and convincing.

"The benefits," he says, "of the integrity and moderation of the judiciary arising from their independence, have been already felt in more States than one, in mitigating

* The Italics are in the original. † §§ 1600, 1601.

the effect of hasty legislation, and of unjust and partial laws. Considerate men of every description ought to prize whatever will tend to beget or fortify that temper in our courts, as no man can be sure that he may not be to-morrow the victim of a spirit of injustice, by which he may be a gainer to-day. And everybody must feel that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence, and to introduce in its stead universal distrust and distress."*

Again, laws necessarily become numerous, and

"To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them."

To acquire a competent knowledge of these laws and precedents, demands long and laborious study.

"Hence it is that there can be but few men who will have sufficient skill in the laws to qualify them for the stations of judges. . . . These considerations apprise us that the Government can have no great option between fit characters; and that a temporary duration in office, which would naturally discourage such characters from quitting a

* § 1603.

lucrative line of practice to accept a seat on the bench, would have a tendency to throw the administration of justice into hands less able, and less well qualified to conduct it with utility and dignity."*

Also:

"It is obvious that, under such circumstances, if the tenure of office of the judges is not permanent, they will soon be rendered odious; not because they do wrong, but because they refuse to do wrong; and they will be made to give way to others, who shall become more pliant tools of the leading demagogues of the day. There can be no security for the minority in a free government, except through the judicial department. In a monarchy, the sympathies of a people are naturally enlisted against the meditated oppressions of their ruler; and they screen his victims from his vengeance. His is the cause of one against the community. But in free governments, where the majority, who obtain power for the moment, are supposed to represent the will of the people, persecution, especially of a political nature, becomes the cause of the community against one. It is the more violent and unrelenting, because it is deemed indispensable, to attain power, or to enjoy the fruits of victory. In free governments, therefore, the independence of the judiciary becomes far more important to the security of the rights of the citizens, than in a monarchy; since it is the only barrier against the oppressions of a dominant faction, armed for the moment with power, and abusing the influence acquired

* § 1605.

under accidental excitements, to overthrow the institutions and liberties which have been the deliberate choice of the people."*

The above facts and reasonings are so elementary and familiar, in relation to our constitutional system, that the extracts may have been found somewhat tedious; but they are of importance when it is considered how little effect such judicious expositions of great principles and such earnest and solemn warnings have had, in preventing the wide and growing adoption in the United States of the very practice thus denounced.

When Mr. Justice Story's work was published (in 1833), only five out of the twenty-four States then existing had adopted the principle of submitting the judges to the ordeal of an election, and appointing them for a term of years.

Eleven years later Mr. Justice Kent, in his Commentaries, published in 1844, enumerates twelve States out of the then number of twenty-nine, in which all the judges were subjected to

* § 1612.

the principle of election, and all appointed for terms of years, varying from two and three to seven and eight, and in one instance only for as many as twelve years.

At present (1853) the elective principle in the appointment of judges, and their appointment for short periods, prevails in twenty-two out of the thirty-one States of the Union. In three others the elective principle has been adopted, but the term is during good behaviour; and in two others they are appointed for a term of years by the Governor.

Such an extensive and absolute departure from, and repudiation of principles that have been held by all the public writers and all the statesmen of the civilised world, to be the very foundation of true liberty, and even of the security of life and property, is a phenomenon which, occurring as it has in so short a time, and among a people so versed in free discussion, must be regarded as among the most extraordinary events in constitutional history. Doubtless it has its point of view from which, under peculiar circumstances, its advocates

have derived their confidence in justifying and maintaining it; and to this I shall take occasion to advert in a note. The fact itself cannot be otherwise than one of the most pregnant importance, and its consequences, though they may be slow in developing themselves, will not be the less certain.

The practice in the different States, in 1844, is described by Mr. Justice Kent, in vol. i. p. 294, of his Commentaries, and may be condensed as follows. At that time (as at present), among the older and more settled States of the Union,—

"Connecticut, though she appointed the judges of her Supreme Court, and of the Superior Court, during good behaviour, required '*all other judges* to be appointed *annually*, by the concurrent vote of the Senate and House of Representatives.'

"Vermont elected all her judges *annually* by the General Assembly.

"Rhode Island, up to the year 1843, elected all her judges *annually*, but in that year, by an alteration in her Constitution, the judges of the Supreme Court were directed to be elected by the Legislature, during pleasure; all the other judges to be elected for *one year*.

"New Jersey and Ohio appointed their judges of the Supreme Court and of the Circuit Courts for *seven years*.

In Ohio the appointment is by the joint ballot of both Houses." [Now, since 1851, by the people.]

Among the younger of the northern States, Indiana and Michigan also appointed their judges of the Supreme and Circuit Courts for *seven years*. In Michigan the judges of the inferior Courts were *elected* by the people for *four years*. The election in Indiana is thus fixed by their Constitution of 1816, s. 7:—

"The judges of the Supreme Court shall be appointed by the Governor, by and with the advice and consent of the Senate. The president of the Circuit Courts shall be appointed by joint ballot of both branches of the General Assembly; and the *associate judges* of the Circuit Courts shall be *elected* by the *qualified electors of the respective counties*." *

"By the Ordinance of Congress of July, 1787, for the government of the north-western territory, the commissions of the judges were to continue in force during good behaviour. But the subsequent Constitution of Ohio and Indiana cut down that permanent tenure to one of *seven years*.

"OF THE SOUTHERN STATES, Tennessee appointed her judges of the Supreme Court for *twelve years*, and of the inferior Courts for *eight years*.

* By the new Constitution of 1851, the judges of the Superior Courts also are now elected by the people.

"Georgia appointed her judges of the Supreme and Circuit Courts for *three years*. These are elected by the Legislature. All the other judges are elected *annually* by the people.

"Alabama, in 1819, established the judicial tenure to be during good behaviour; but the Constitution has been since altered, and the tenure changed to *six years*, and the election is by joint vote of both Houses of General Assembly.

"By the first Constitution of the State of Mississippi, in 1807, the judges held their office during good behaviour, or until 65 years of age, and were appointed by the joint vote of the two Houses of the Legislature, given *vivâ voce*, and recorded. But by the Constitution, as amended in 1833, *every officer of the* Government, legislative, *executive*, and *judicial*, is *elected by the universal suffrage* of the people; that is by every free white male citizen of twenty-one years of age, who has resided within the State for one year preceding, and for the last four months within the county, city, or town in which he offers to vote. The judges *of the Supreme Court* of *Errors and Appeals*, are thus chosen by districts *for six years*. The *Chancellor* is elected *for six years* by *the electors of the whole State*. The *judges of the Circuit Courts* are elected in districts *for four years*. The *judges of probates* and clerks of courts are elected *for two years*, &c. This is carrying the democratic principle beyond all precedent in this country.

"In Arkansas the judges of the Supreme Court hold their offices for *eight* years, and the judges of the Circuit Courts for *four* years."

Since the date of Mr. Justice Kent's summary of the different modes of appointment of judges in the different States, the great State of New York has adopted the elective system in the appointment of judges. In that State the judges, by the present Constitution, hold their offices for *eight* years, and are *elected by the people*, that is to say, "by the white male citizens of twenty-one years of age, who have resided one year in the State, and four months preceding the election." "Persons of colour who have resided three years in the State, and who possess a freehold of 250 dollars, and have held it one year, have a right to vote."

In the important State of Pennsylvania also the principle of the appointment of judges for terms of years has been adopted; the judges of the Supreme Court being appointed (by the President and Senate) for *fifteen* years, those of the Court of Common Pleas for *ten*, and the Associate Judges for *five* years. And in the State of New York the salaries of the judges of the Superior Courts are subject to an annual vote of the Legislature, which renders

them annually liable to dismissal from their posts at the pleasure of the Legislature.

In Florida the judges (since 1851) are elected by the people for *five* years; in Missouri, Iowa, Wisconsin, and California, for *six;* and in Maryland, and even in Kentucky and Virginia, by their new Constitutions of 1850 and 1851, the judges are elected by "the white male citizens of 21 years of age" (resident from six months to two years), in the first State for *ten*, and in the last for *four*, *eight*, and *twelve* years.

In twenty-two States, therefore, it appears that the judges are appointed by *election*, either annually (as in four instances), or for terms of two, three, four, five, six, seven, eight, ten, twelve, or, in one instance, fifteen years.

In Illinois, and in North and South Carolina, the appointment is by *election* by the joint ballot of both Houses, but the term during good behaviour.

Louisiana has adopted the principle of a term of years; the judges being appointed by

the Governor for *eight* years. Texas also limits their term of office to *six* years, but places the appointment in the Governor.

In the remaining States the judges are, I believe, appointed in the manner hitherto deemed by all authority and experience to be the only one by which the independence of the judiciary can be secured, and with it the rights and liberties of the people; that is, by the Executive, and during good behaviour.

It is impossible to look upon this widespread departure from the only practice which could secure the independence of the judiciary, without recognising in it a feeling, as widely diffused, which aims at putting an end to that independence. The burden of all those elaborate arguments and earnest warnings of the greatest statesmen and lawyers whom the United States has produced, as above quoted, has been, that there was but one check, under their system of government, upon the self-will of democracies, one security against the tyranny of the majority, and that was to be found in the independence of the judicial body. We

have seen that this independence was attacked as far back as the year 1801, by President Jefferson, in his endeavour to bring about an alteration in the Constitution, which would permit of the judges of the Supreme Court of the United States being appointed for terms of years only. We have seen that, by an Act of Congress, in the year 1803, judges of the Circuit Courts of the United States, who had been appointed in accordance with the Constitution, were, by a legislative Act, dismissed, in a manner, according to the best legal opinions, totally unauthorised by the Constitution; and that President Jackson advocated the principle of appointments for terms of years in 1829 and in 1832.

It is perfectly well known also that from the time of the framing of the Constitution to the present day, there has existed a strong feeling of jealousy, and an open hostility, on the part of the ultra-democratic body throughout the Union, in relation to the judiciary, whether of the individual States or of the Union; and it is only too evident that this jealousy and hos-

tility have manifested themselves in the legislation which has been above referred to, and by which the judges of so many of the States have been subjected to the ordeal of popular elections, and their tenure of office degraded into one of a temporary and precarious character.

This great revolution in the theory and practice of constitutional government, as understood by the founders of liberty in the United States, is both a consequence of the progress of ultra-democratic principles in that country, and a powerful means of supporting them. The fundamental change in the principles of free government, as hitherto understood in all free countries, has taken effect, as has been seen, in no less than twenty-seven States of the Union. Its consequences upon their individual peace and welfare, upon the tone and character of the State Governments, and the security of those who live under them, are matters beyond the scope of the subjects now under consideration. Within the period of a generation, probably, this will have become abundantly evident. But its probable results upon

the Constitution of the United States is a question of general interest, and one immediately connected with the matter in hand.

The independence of the judiciary is, to use the words of Mr. Justice Story,—

"The citadel of the Constitution." . . "Nothing is more facile in republics than for demagogues, under artful pretences, to stir up combinations against the regular exercise of authority. Their selfish purposes are too often interrupted by the firmness and independence of upright magistrates, not to make them at all times hostile to a power which rebukes, and an impartiality which condemns them. The judiciary, as the weakest point in the Constitution on which to make an attack, is therefore constantly that to which they direct their assaults, and a triumph here, aided by any momentary popular encouragement, achieves a lasting victory over the Constitution itself. Hence, in republics, those who are to profit by popular commotions or the prevalence of faction are always the enemies of a regular and independent administration of justice. They spread all sorts of delusions, in order to mislead the public mind and excite the public prejudices. They know full well, that without the aid of the people their schemes must prove abortive, and they, therefore, employ every art to undermine the public confidence, and to make the people the instruments of subverting their own rights and liberties."*

* §§ 1611, 1621.

Now, by the fifth Article of the Constitution, the mode of proceeding to make amendments to it is as follows:—

"The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the *Legislatures* of *two-thirds* of the *several States*, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by conventions of three-fourths thereof, as one or the other mode of ratification may be proposed by Congress."

Already the Legislatures of much more than "two-thirds of the several States" (twenty-seven out of thirty-one) have destroyed the independence of the judiciary, by rendering their offices elective, or their tenure for a few years only, or both.

There can be no doubt that the proportion will steadily, not to say rapidly, increase; for there can be no question of the ultra-democratic tendencies of all the new States that are rising in the extreme west. When, therefore, Oregon, Minesota, Utah (the Mormon

Valley), New Mexico, and Nebrasca, are, from territories, erected into States, which must happen in the course of a few years, the proportion of States which will have adopted this principle, as compared with those which have not, will be thirty-two out of thirty-six. It is to be expected also that the ultra-democratic principles will before long gain the ascendancy in the few older States which have hitherto withstood them. Kentucky yielded to them in 1850, and Virginia in 1851. Even Massachusetts, where old associations, hereditary property, a more settled population, accumulated and rapidly-accumulating wealth, and a high standard of general education, have for the most part maintained the Whig party in the ascendant, —even Massachusetts, where, if anywhere in the Union, the anticipations of the founders of the republic have been answered, in combining the greatest latitude of popular power with social culture, intellectual progress, and firm government,—even that State is threa-

tened with the approaching triumph of the democratic party; the propositions of the late Convention for certain alterations in their Constitution, in accordance with the principles of that party, having been only lost, as above adverted to, on the recent trial of strength, by (in round numbers) 5000 out of a total of 130,000 votes.

Already a large majority of both Houses of Congress belong to the democratic party. It may be anticipated, therefore, that by either mode of proceeding—either by the concurrence of "two-thirds of both Houses of Congress," or "on the application of the Legislatures of two-thirds of the several States"—it will soon be perfectly within the power of that party in the Union to force an amendment of the Constitution, which shall deal with the independence of the judiciary of the United States as they have already dealt with it in their own several States.

It is clear, indeed, that they have now the power of doing so. And it is equally in accordance with their principles, with their well-

known energy and perseverance, with the interests of their party, and their presumed belief that they are doing what is best for their country, that they will not be long in endeavouring to exercise that power with effect. When they have done so, the judiciary of the United States will be no longer what it now is, "a co-ordinate power in the State," "the balance-wheel of the Constitution," "the only check upon the invasions of faction," and "the safeguard of the rights and liberties of the people against the tyranny of majorities."* It will be none of these things, and there will remain none in the then form of government of the United States.

Under another point of view, also, the way is being prepared for this change, which is effecting the destruction of the independence and lowering the position of the judiciary in those numerous States above-mentioned. It is from among the general body of the legal profession that the President and Senate of the United States

* § 1621.

must look for men of learning, integrity, and firmness, to fill the high and important functions of the Supreme Court, and the circuit and district courts of the Union. On this subject Mr. Justice Kent says, in the 1st vol. of his Commentaries, p. 443:—"The United States are fairly entitled to command better talents, and to look for more firmness of purpose, greater independence of action, and brighter displays of learning, in the judiciary of the United States' Courts," than can be expected by those individual States "where the tenure of office of the judges is uncertain, and a liberal and stable provision is not made for their support." But if in those States, now so numerous, and likely to become more so, the position of the judge is degraded, the estimation of the whole legal profession will be altered, and men of ability, acquirements, and high feeling will not be found to devote themselves to it, as a career of honourable ambition as well as a means of arriving at wealth or competence. When this takes place, and when the standard of learning and the tone

of independence and honour has been lowered in that profession, where will be found the men to set public opinion right on points which require study, thought, and elevation of mind to master; to make a stand against propositions which they see will be fatal to true liberty; or to act with fearlessness against public clamour? And where will then be the remembrance of the fact, that in the celebrated "Declaration of Independence" of the 4th of July, 1776, one of the principal articles of complaint made against the Sovereign of this country was, that "*he made judges dependent on his will alone for the tenure of their offices, and the amount and payment of their salaries*"?*

* Since the above was written, an ominous confirmation has come under my notice, of the tendency of public opinion in the United States in this particular. Professor Lieber, in his work on Civil Liberty and Self-Government (Boston, 1853), p. 190, thus adverts to a recent fact regarding it:—"It seems to me a strange anomaly that, as it would seem by a late resolution in the United States' Senate, the President has authority to remove judges in the 'Territories.'"

The principle is the same, whether acted upon in the "Territories" or the States. The independence of the judges is equally threatened. To this subject Professor Lieber devotes a chapter

of earnest reasoning and solemn warning, in the endeavour to support the sound doctrine of the Constitution. He reiterates the elementary truth that "the immovability of judges is an essential element of civil liberty." He has also treated the subject very ably in a letter addressed to the German people in 1848: "Ueber die Unabhängigkeit der Justiz, oder die Freiheit des Rechts in England und in den vereinigten Staaten." Heidelberg, 1848.

CHAPTER XVI.

CONCLUDING REMARKS.

THE questions to which Mr. Justice Story devotes the few remaining chapters of his "Commentaries" are, Trial by Jury, Treason, the Bill of Rights, the Right of Petition, the Liberty of the Press, the Quartering of Soldiers, General Warrants; and upon these the law and practice of the United States are either identical with our own, or differ only in particulars which present no points of interest in a comparison between their practice and ours. The clause in the Constitution relating to slavery and fugitive slaves is touched upon very briefly, and without adding any particulars of general importance. The few other topics which he adverts to do not require spe-

cific notice. But the following passages from his concluding remarks can never be read, either in that country or in this, without exciting admiration for his eloquence, sympathy with his noble aspirations, and a participation in his forebodings and fears.

"The fate of other republics—their rise, their progress, their decline, and their fall—are written but too legibly on the pages of history, if, indeed, they were not continually before us in the startling fragments of their ruins. They have perished, and perished by their own hands. Prosperity has enervated them, corruption has debased them, and a venal populace has consummated their destruction. Alternately the prey of military chieftains at home, and of ambitious invaders from abroad, they have been sometimes cheated out of their liberties by servile demagogues, sometimes betrayed into a surrender of them by false patriots, and sometimes they have willingly sold them for a price to the despot who has bid highest for his victims. They have disregarded the warning voice of their best statesmen, and have persecuted and driven from office their truest friends They have listened to the fawning sycophant, and the base calumniator of the wise and the good. They have reverenced power more in its high abuses and summary movements than in its calm and constitutional energy, when it dispensed blessings with an unseen and liberal hand. They have surrendered to faction what belonged to the country. Patronage and party, the triumph of a leader, and the discontents of a day, have outweighed all solid

principles and institutions of government. Such are the melancholy lessons of the past history of republics down to our own. . . .

"If these Commentaries shall but inspire in the rising generation a more ardent love of their country, an unquenchable thirst for liberty, and a profound reverence for the Constitution and the Union, then they will have accomplished all that their author ought to desire. Let the American youth never forget that they possess a noble inheritance, bought by the toils, and sufferings, and blood of their ancestors, and capable, if wisely improved and faithfully guarded, of transmitting to their latest posterity all the substantial blessings of life, the peaceful enjoyment of liberty, property, religion, and independence. The structure has been erected by architects of consummate skill and fidelity; its foundations are solid; its compartments are beautiful, as well as useful; its arrangements are full of wisdom and order; and its defences are impregnable from without. It has been reared for immortality, if the work of man may justly aspire to such a title. It may, nevertheless, perish in an hour by the folly, or corruption, or negligence of its only keepers—the people. Republics are created by the virtue, public spirit, and intelligence of the citizens. They fall when the wise are banished from the public councils because they dare to be honest, and the profligate are rewarded because they flatter the people in order to betray them."*

Some considérations, which may not be

* Story, §§ 1910–1914.

without their value in this country, are suggested by what has been exhibited of the principles of the Constitution of the United States, and of its mode of working, as developed in the first sixty-five years of its existence.

The advocates of extreme popular opinions in this country are dissatisfied with the principle on which the House of Commons has been hitherto constructed, and require that, instead of its being composed, as it is now, of the representatives of all the interests, feelings, and opinions of the various classes and sections of society, from the highest, very nearly to the lowest, the preponderance being largely on the side of property, cultivation, high acquirements, and stable and hereditary instincts and convictions—it should be made to represent more completely and directly, if not almost exclusively, the numerical mass of the community; under the supposition that the interests of the latter would then be better cared for, and that the interests first enumerated would, in some manner or other, take care of

themselves. Were the advocates of these opinions to succeed in effecting this change, they would establish a mode of government far more democratic than anything existing under the Constitution of the United States. They profess to desire to preserve the present form of parliamentary government by Queen, Lords, and Commons; but, at the same time, to throw the balance of power completely into the scale of the numerical majority and their representatives in the House of Commons, in order that the will of that majority, as represented at the moment, might be brought to bear at once and without delay upon the legislation of the country. If this were to be so, it is plain that neither the Upper House of Parliament nor the Crown could be permitted, either in theory or practice, to interpose delay, and their functions would be reduced to little more than giving a formal assent to the declared will of the Lower House. In fact, under whatever name it might be covered, the government of this country would have become a pure democracy.

Now we have seen that the Constitution of the United States has endeavoured itself by every precaution that it is in the power of a republican constitution to adopt, against being, or if possible, ever becoming, a pure democracy. It is described by its framers as "a Constitution of limited and balanced powers;" the democratic element in it is subjected to numerous and powerful checks, and in point of fact, when contrasted with the power and "influence" of the President, and the higher and more independent position of the Senate, that element is greatly reduced in relative weight and authority, and is unable suddenly to overbear the other two branches of the Legislature. But above all, it has, above it, and the Senate, and the President, the authority of the judiciary—the judges of the Supreme Court of the United States—not a subordinate, but, be it always borne in mind, a *co-ordinate* power in the State. It is that power which is charged, in the last resort, to check any the slightest inroads upon or deviations from the strict letter of the Con-

stitution; to oppose any possible invasions of democracy upon the distribution and balance of power, as established by the formal consent of the great body of the community; to act in all emergencies threatening that balance, as the great conservative power of the State, able to declare "void and of none effect" any legislative attempts to overturn it.

Such a power, above and paramount to any Act of the Legislature, we know nothing of under our system of government; yet, without it, a House of Commons, constituted as the advocates of extreme opinions in this country desire, would be without check or control, and a mode of government would be established in this country as widely different from that possessed, under their Constitution, by the people of the United States, as a limited constitutional government is from a pure democracy.

But would the advocates of those extreme opinions desire to take a further step, and endeavour to assimilate our institutions entirely to those of the United States? If so, they must be then prepared for a change in the

mode of carrying on the business of legislation, which will make it entirely different from that to which we have hitherto been accustomed. They must be prepared to abandon what we are accustomed to call "parliamentary government." Under the legislative system of the United States, parliamentary government does not exist. With us, if the Minister for the time being, in the ordinary course of things, has not the support of the majority of the House of Commons, he must resign, and give way to a ministry that has. Under the system of the United States, neither President nor Ministry have any absolute necessity for a majority in either House of Legislature, and have in many instances, carried on the Government for two, three, and four years, without it. The advocates of extreme popular opinions in this country wish to invest the House of Commons with an authority and power so direct and immediate in its action, as to be liable to little or no restraint from any other powers in the State. If they were to endeavour to arrive at

their object by inducing this country to adopt the institutions of the United States, they would very soon find that the present high and independent position of the House of Commons would have been exchanged for one in which the Senate would share with them the power over the public purse, and in which the President would be able by his "influence" to cause the supplies to be voted by majorities in both Houses adverse to his general policy. Moreover, they would discover, if the analogy between the two Legislatures in both countries were fully carried into effect, that, instead of the House of Commons being, as now, the most prominent of the two Houses of Parliament in all matters of legislation, and by far the most powerful of the two, it would have been reduced to inferiority, both in position, in general estimation, and in power.

I should be sorry if, in drawing comparisons between our system of constitutional government and that of the United States, I should be thought by any one in that country to have been actuated by feelings in the least

degree approaching to hostility or unkindness. I have been compelled, by the evidence of facts, to show that their constitutional system, in its actual practice, has in several important points deviated from the path marked out for it by the letter and spirit of the Constitution, and declined from the standard therein held up to their admiration and reverence. I have shown this in the words of the ablest commentators, and of some of the most distinguished statesmen who have adorned the annals of their country. And I have been justified, by reference to the plain and open current of events in all parts of the Union, in inferring that the way is being prepared for still greater deviations from the letter and the spirit of the Constitution, by the successful attacks that have been made upon that which has been regarded as the very "citadel" of their institutions, the independence of the judicial body. It may not be agreeable to many persons in the United States that these matters should be brought forward into the general light, and submitted to observation in Europe. We are sometimes told also

that their institutions do not concern the people of Great Britain, and that, in commenting on them, we go out of our way gratuitously, in order to indulge passions of the lowest order and of the most contemptible kind.

A bad compliment would indeed be paid to the Constitution of the United States, by any one in this country who would presume to say, that the institutions under which upwards of twenty millions of the Anglo-Saxon race had elected to live, did not concern him; that their prospects of well-being, of intellectual, moral, and religious progress, of rational liberty and social happiness, were to him matters of no interest, and that they could have no effect upon the mind of this country. In point of fact, we have the very deepest interest in them. There are but two great systems of free government in existence, theirs and ours, and constitutional governments are now on their trial before the civilised world. They have to prove that moderate and rational liberty, besides contributing most to mere material well-being, is not inconsistent with firm govern-

ment, with truth and justice, with faith and reverence, with honour and honesty, with learning and taste, with gentleness and obedience, with imagination, with art, and with science, and with all these in their highest state of development, and therefore of their capacity to raise the civilised man above the level of low desires, and up to the highest point of intellectual and moral perfection attainable by his finite nature. We believe, in this country, that our system of government is the best yet devised, or rather yet unfolded in the mysterious order of Providence, for leading to all those great objects. To defend and strengthen it, therefore, to remove its imperfections and widen its basis is, to the Englishman who thinks aright, among the first of duties; for in so doing he is aiding to perpetuate a great inheritance, and perhaps to extend to other nations the means of arriving at those blessings which it is calculated to draw forth and foster. But if he is to scan the defects and probe the imperfections of his own system of government, with a view to amend,

reanimate, and invigorate it, why should he not also look abroad for examples that he may profit by, or warnings of what he should avoid? The Constitution of the United States challenges him to such inquiry; for it was, during those cloudy days of political blindness on one side, and just resentment on the other, established in direct antagonism to our own, in many of its fundamental principles; under the guidance of those new theories of government which rose into a hasty and immature prominence and popularity on the continent of Europe, in the midst of the heated passions and the material sufferings, the tyranny, the resistance, the moral anarchy, the scepticism, and the presumption, of the end of the 17th century, and the greater part of the 18th. We have a right to inquire how those theories work, and whether they encourage us to borrow from, or warn us to avoid them. Into the petty details of what might be called by the various names of corruption, misgovernment, weakness, neglect, incapacity, wilful wrong, or omission of right, on either side, there is

no necessity, with a view to the present purpose, to enter. But if I have shown that a Constitution which claimed to be an improvement upon all other Constitutions that were ever designed by man, and especially upon our own, has in the first sixty-five years of its existence given proof of defects which experience has not shown to exist in our own, and has declined from the high ideal which its framers claimed for it, I have done that for which I owe no apology to any one, and which, in a spirit of reverence for the wisdom of our own time-honoured institutions, in all their great fundamental principles, and with a deep sense of the benefits which, under Providence, they have conferred upon this country, I rejoice to have be enable to do.

NOTES.

NOTE I. (TO CHAPTER VIII.)*

THE authors of the "Federalist" (Mr. Madison, Mr. Hamilton, and Mr. Jay), speaking the opinion of the most enlightened men of their time, asked themselves, when entering upon the great enterprise of framing a constitution, "whether societies of men are really capable or not of establishing good government by reflection and choice?" whether it is within the power of human wisdom at once to strike out a political system which shall combine the elements of freedom and authority in the measure required to satisfy the highest purposes of civil society? They believed themselves capable of that effort. They at the same time believed themselves to be the only people, not then free, who were capable of it. President John Adams, writing to the late Mr. Richard Sharp, in the year 1811, thus expresses himself on that subject:—

"The people of America, from their singular situation, education,† occupations, and character, have gone through

* I have placed these Notes in the order in which they may be read continuously, instead of in the order of the Chapters to which they refer.

† In municipal self-government, as well as political; the former being the essential school for the latter.

all this (the severe trials of the Revolution). But, without any national pride, or any fastidious national antipathies, I cannot believe, from anything I have seen or read, that any other people are capable of it. In other nations, a revolution will be only an exchange of one absolute government for another.

"Elective governments not only give full scope to the hopes of all men, but afford continual temptations to aspire; and we have already seen very bold and daring strokes of a determined and desperate ambition."*

In the many instances of failure in the attempts during the last sixty years to establish constitutional government in communities where there was not "intellect, information, and integrity enough to be depended upon through severe trials,"† may be read the confirmation to a great extent of the above prognostications. In France, in particular, the destruction of all faith, to so great an extent, among the educated classes, the consequent want of confidence between man and man, the rash surrender of sound sense to plausible theories, the sweeping away of everything from the land but a poor and unenlightened peasantry, have, in the period that has elapsed since the first revolution, brought about the all but literal fulfilment of the prophecy of Burke, uttered in 1790, "that if the present project of a republic should fail, all securities for a moderate freedom fail along with it; all the direct restraints which mitigate despotism are removed; *insomuch that if monarchy should ever again obtain an entire ascendency in France, under this or any other dynasty, it will probably be*, if not voluntarily tempered at setting out, by the wise and virtuous counsels of the prince, *the*

* Letters and Essays, by Richard Sharp, M.P., London, 1834, p. 98.

† Ibid., p. 99.

most complete arbitrary power that has ever appeared on earth."*

The experience of "elective government" in the country of Washington, of John Adams, of Madison, of Hamilton, and of the other great men of the Revolution, has, as we have seen, been already sufficient to justify their own misgivings, to the extent, at the very least, of having afforded proof of the fact that both the basis of the Constitution which they founded, and its practical workings, are altered since their day in many important particulars, and both in the direction of pure democracy, in exchange for that stable system of balanced powers which was the object of their aspirations and struggles.

The experience of the world, from the very birth-day of ancient freedom, through the period of its heroic manhood in the old republics, and up to this present hour, proves that political institutions, to be firm, just, equal, beneficent, and enduring, must be "not a creation, but a growth;" that they require many elements of food and nurture for their sound development; and that the over-predominance of one leads to disease and decay.

This over-predominance has been encouraged in modern times by such notions as "confiding in the instincts of humanity;" "trusting to the principles of society in their action upon the nature and conduct of man;" "having an unlimited confidence in the human mind;" "trusting implicitly to the innate sense of what is best for the interest of the individual and the community;" "submitting cheerfully to what may be the declared will of the mass of the people, because it is their will; and because, if wrong, they will soon find it out, and take a better

* Burke's Reflections on the Revolution in France, pp. 303-4, vol. iv. of edit. of 1853.

course:" all omitting to take any sufficient account of human passions, and of their continual tendency (up to this period of the world at least) to sway human action, in opposition to all the efforts of the most enlightened reason, though strengthened, it may be, with all the panoply of faith. Such notions were well designated by the authors of the "Federalist" as "idle theories, which amuse with promises of exemption from the imperfections, the weaknesses, and the evils incident to society"—"deceitful dreams of a golden age," from which it was time to awake to the practical maxim that they were "yet remote from the happy empire of perfect wisdom and perfect virtue."*

"Representative bodies," says Mr. Jay, in a letter to Washington, in 1786, "will ever be faithful copies of their originals, and generally exhibit a chequered assemblage of virtue and vice, of abilities and weakness. The mass of men are neither wise nor good; and the virtue, like the other resources of a country, can only be drawn to a point by strong circumstances ably managed, or a strong government ably administered."†

Note II. (to Chapter VIII.)

In the collection of "Letters of Eminent Men to George Washington," lately published by Professor Jared Sparks,‡ is one from Mr. Jay to Washington, from which I extract

* Federalist, No. 6.

† Story, vol. iv. p. 186. Edit. of 1833.

‡ Correspondence of the American Revolution. By Professor Jared Sparks. Boston, 1853. 4 vols.

the following passage, as bearing upon the subject of the previous note, and as illustrative of the difficulties that beset the course of the statesmen of America, in their transition from the Confederation, which had so signally failed, to the Constitution; and of their fluctuations of mind before they could determine how to adjust the powers of the new government they were engaged in forming.

"JOHN JAY TO WASHINGTON.

"*New York, January* 7, 1787.

"Dear Sir,—They who regard the public good with more attention and attachment than they do mere personal concerns, must feel and confess the force of such sentiments as are expressed in your letter to me. . . . . The situation of affairs calls not only for reflection and prudence, but for exertion. What is to be done? is a common question, but it is a question not easy to answer. . . . .

"Would the giving any further degree of power to Congress do the business? I am inclined to think it would not."

Mr. Jay proceeds to give his reasons for this opinion, founded on the selfishness and corruption already exhibited in that Assembly, and the tendencies of large assemblies "to misunderstand or neglect the obligations of character, honour, and dignity;" and he then proposes a more distinct division of the powers of the Constitution into legislative, executive, and judicial.

He then adds:—

"Shall we have a king? Not, in my opinion, while other expedients remain untried. Might we not have a Governor-General, limited in his prerogatives and duration? Might not Congress be divided into an Upper and a Lower House; the former appointed for life, the latter

annually; and let the Governor-General (to preserve the balance), with the advice of a Council, formed, for that purpose, of the great judicial officers, have a negative on their acts? Our Government should, in some degree, be suited to our manners and circumstances; and they, you know, are not strictly democratical." *

The whole scope of the learned work of John Adams,† (afterwards the second President of the Republic) written in the same year as the above letter (1787), is to prove, that no system of Constitutional Government can be just or durable that does not guard against the over-predominance of any one of its elements. And he illustrates this principle by passing in review, in the most masterly manner, the Governments of all the ancient and modern Republics, of which classical or recent writers have left descriptions.

He expresses his entire agreement with the principle laid down by Macchiavelli, in his remarkable letter to Leo X., on a scheme of reform for the State of Florence, in which he says, "Those who model a commonwealth must take such provisions as may gratify three sorts of men, the high, the middle sort, and the low."‡ Of this Mr. Adams speaks, as "this great truth, this eternal principle, without the knowledge of which every speculation upon government must be imperfect, and every scheme of a commonwealth essentially defective." §

* Vol. iv. p. 153.

† The Defence of the American Constitutions. London, 1794, 3 vols.

‡ "Coloro che ordinano una Republica debbono dare luogo a tre qualità de uomini, che sono in tutte le città, cioè primi, mezzani, ed ultimi."—Macchiavelli's Works, vol. v. p. 246. [Dare luogo, "assign a place to," not "gratify."]

§ Vol. ii. p. 242.

In several parts of his work he points to the existence in the United States, in his time, of these several elements, "even in the northern States (especially in Massachusetts), as well as in the middle and southern;" and if he had any fears for the future, it was that "the natural and artificial aristocratical body in every State" would become too powerful.* He considers, however, that they are sufficiently kept in check by the arrangements of the Constitution, which were, in his opinion, as nearly similar to our own as circumstances permitted, though not so much so as he desired. Upon our own Constitution he pronounces this eulogy:—

"I contend that the English Constitution is, in theory, the most stupendous fabric of human invention, both for the adjustment of the balance, and the prevention of its vibrations, and that the Americans ought to be applauded instead of censured for imitating it as far as they have. Not the formation of languages, not the whole art of navigation and ship-building, does more honour to the human understanding than this system of Government. The Americans have not indeed imitated it in giving a negative upon their Legislature to the Executive power; in this respect their balances are incomplete, very much to my mortification."†

The want of these due adjustments of the balance of power in a State must, he says, lead to continual changes and fluctuations. "The only way to prevent these evils is to establish the several classes and ordinances of the commonwealth in such a manner that they may support themselves; and that they will always be able to do, when each rank has its due share of the administration, when every one knows his proper sphere of action, and whom he can

* Vol. i. p. 371; vol. iii. p. 124. † Vol. i. p. 70.

confide in; and, lastly, when no one has any occasion to wish for a change of Government, either because his ambition is not thoroughly gratified, or that he does not think himself sufficiently secure under such an administration."*

Note III. (to Chapter IX.)

"A Constitution based upon extreme opinions leads infallibly to despotism."

So spoke Niebuhr,† in accordance with all authorities who have dealt with the great question of political government in a truthful and impartial spirit, and on due acquaintance with the lessons of history.

"The tyranny of the majority" is the danger ever impending in free governments, in proportion as they approach to pure democracies.

This danger was present to the minds of the framers of the Constitution of the United States, and led them to bend their most earnest thoughts to devise the means by which "the superior force of an interested and overbearing majority" might be prevented from disregarding the interests, and violating the rights of the minority.‡

Whatever may be the case up to this time with regard to the working of the general Government and Constitution of the United States, it is indisputable that in the individual States the complaints are frequent of the exercise of this species of tyranny by the majority which, for the

* Vol. ii. p. 250.

† Life and Letters of Niebuhr, vol. iii. p. 119. London, 1852.

‡ Federalist, No. 10.

time being, may wield the powers of the State Government.

Mr. Justice Kent argues strongly against the sudden changes in legislation in the individual States, which the alternate succession of opposite parties to power brings with it, each supported, perhaps, only by narrow majorities, and holding office but for a short period. He says: *—

"A mutable legislation is attended with a formidable train of mischiefs to the community. It weakens the Government, and increases the intricacy of the laws, hurts credit, lessens the value of property, and it is an infirmity very incident to republican establishments, and has been a constant source of anxiety and concern to their most enlightened admirers. A disposition to multiply and change laws upon the spur of the occasion, and to be making constant and restless experiments with the statute code, seems to be the natural disease of popular assemblies."

And he commends the new Constitution of Rhode Island, adopted in 1843, for its tendency to prevent those evils.

"The Constitution of Rhode Island, which was organised and went into operation in 1843, has constituted the Senate of that State upon conservative principles, while the House of Representatives is constructed upon the basis of population, giving to each city and town a representation in a ratio to its number of inhabitants. The Senate is composed of only one member from each city and town, so that the legislative power cannot be wielded by overwhelming numbers in a few great manufacturing towns or cities, to the oppression of the agricultural towns. It is a salutary and provident check to the tyranny of majorities over minorities."†

* Vol. i. of his Commentaries, p. 227.

† Vol. i. p. 227, note.

The following, which I take from a recent American paper, is a somewhat curious instance of an opposite complaint—opposite in terms, but the same in substance—which shows how naturally men are disposed to be dissatisfied with laws imposed upon them summarily by narrow majorities, and which they may hope shortly, by some equally narrow majority, to repeal.

"OHIO, JULY, 1853.

"One hundred and eighty-five thousand electors in this State of Ohio have (by their differences and divisions) chosen to be governed by one hundred and seventy thousand for some years past. The minority have ridden rough-shod over the majority, fettering them . . . . robbing them by unequal taxes," &c., &c.

I observe, also, in the American papers, complaints that the "Maine Law," as it is called, forbidding the sale of spirituous liquors, except under certain circumstances, is being forced upon the people of some States by small majorities, in spite of a strong reluctance to it on the part of minorities, on the ground, among others, that such a law exceeds the true province of legislation. In the State of New York, this law passed the Senate by a majority of four only. In Rhode Island it was carried, but the democratic majority is said to have appointed officers hostile to the law, who prevent its being executed. "In Boston, its effect is defeated by the number of licences granted. The new Legislature, chosen in November, 1852, sustained the law. An attempt to repeal it failed, and a bill to make it more stringent failed also; in the House of Representatives the numbers were equal, and it was lost in the Senate by one vote."

The particular law now exciting the disapproval of large minorities, yet forced upon them in opposition, as they

think, to all sound precedent, is of comparatively little importance, except as illustrating the principle, which may be at present contemplated at work on a far larger scale and on vital points, in the rapid advance of pure democracy, even in the older States, over the old mixed and balanced principles of constitutional government, with all the consequences of internal and external policy therein involved. This change must be all the more painful to the party opposing it, because brought about in many instances by narrow majorities and within a short space of time. It may be submitted to, under the conclusion that it is, in that country, a part of "a general and inevitable law" of social and political change; but it is not the less discordant to all the feelings, habits, and opinions hitherto recognised as the foundation of their government, and as giving it its title to the respect and confidence of the world. Its ulterior consequences are beyond the ken of the present generation. They might be calculated with somewhat more confidence were not the problem complicated by the continual addition to the population of the United States of such large numbers of the worst subjects of European Governments—men bringing with them the most embittered feelings, and the most false and pernicious theories of politics and social life. The actual spread of ultra-democracy in the United States contradicts the theory, and has falsified the expectation, that these importations of extravagant opinion and perverted principle will be absorbed and neutralised by the sounder elements with which they mix. They find too many congenial ingredients, to which they but add a new vigour. It must be many years yet before any one can presume to say which is the most probable—acquiescence in this ultra-democratic predominance, or resistance. M. De Tocqueville has already said that "if the free institutions of America are to be destroyed, it will be owing to

the tyranny of majorities, driving minorities to desperation."* The resource of minorities under such circumstances has ever been, through all periods of history, one only—the surrender of their own liberties to some one man, capable of defending them against a greater oppression; and the easy and natural steps by which, in pure democracies, this transition takes place, has been lately described with philosophical accuracy by Dr. Lieber, Professor of History and of Political Philosophy and Economy in the State College of South Carolina, in his work "On Civil Liberty and Self-Government."† Professor Lieber says truly "That the multitude are necessarily led by a few, or by one; and thus we meet in history with the invariable result that virtually one man rules where the absolute power of the people is believed to exist. After a short interval, that one person openly assumes all power, sometimes observing certain forms of having the power of the people passed over to him. The people have already been familiar with the idea of absolutism; they have been accustomed to believe that wherever the public power resides it is absolute and complete; so that it does not appear strange to them that the new monarch should possess the unlimited power which actually resided in the people or was considered to have belonged to them. There is but one step from the 'all-powerful people' (the 'peuple tout-puissant'), if indeed it amounts to a step, to an emperor all powerful."‡ And he intimates that the changes that have actually occurred in history, from democracies, to absolutism in the hands of one man, are attributable to the fact that the people "consciously or instinctively"

* De la Démocratie en Amérique, vol. ii. ch. 7.
† London, 1853, p. 331.
‡ Page 330.

surrendered their liberties, "because the ancient institutions had become oppressive."

Note IV. (to Chapter XIII.)

There is no circumstance which is more directly preparing the way for the transition above-mentioned (from ultra-democratic tyranny, to absolutism in the hands of one man) than the growing habit of external aggression, and the wide-spread anxiety among the democratic party in the United States to take a part in the affairs of Europe. It is superfluous to refer to the solemn warnings bequeathed by Washington, and by all the great men of the revolution, on this momentous subject. From the moment that the fellow-countrymen of Washington act in opposition to that advice, they will have passed a turning-point in their history, beyond which they will have before them "sea without shore."

The authors of the "Federalist," seeing in the possibility of internal war between the individual States the great danger to liberty, employed all their reason and eloquence in softening down the causes of difference, and in pointing out the inevitable consequences should hostilities unfortunately arise. Their arguments apply with even greater force to the consequences which would ensue from their involving themselves with foreign powers by an aggressive policy, which those powers would feel compelled to resist. The paper, No. 8, attributed to General Hamilton, urges that war, or the apprehension of war, which requires a state of constant preparation, infallibly produces

the necessity for standing armies; that States having recourse to them, and to "a more regular, and effective system of defence by disciplined troops and by fortifications," must at the same time "strengthen the executive arm of Government; in doing which their Constitutions would acquire a progressive direction towards monarchy. It is of the nature of war to increase the executive at the expense of the legislative authority."* "But in a country where the perpetual menacings of danger oblige the Government to be always prepared to repel it, her armies must be numerous enough for instant defence. The continual necessity for his services enhances the importance of the soldier, and proportionably degrades the condition of the citizen. The military state becomes elevated above the civil."†

General Hamilton distinguishes the case of Great Britain from that of the military powers on the Continent, and shows that our insular situation and the spirit of our government expose us to no such danger. But if it be true, in the words of Mr. Justice Story, that "the best talents and the best virtues are driven from office by intrigue or corruption, or by the violence of the press and of party;" if the complaints so often uttered in the United States, that men of cultivation, of high principle, and mature wisdom are more and more indisposed to the duties of political life, are well founded, then must the tendency increase to select military men for office, if for no other reason, at least for this, that they will have had more experience in affairs, and know how to govern men. And the necessity of being governed, will, irrespective of the aspirations after conquest and a military name, be more and more pressing upon the people of the United States.

* Page 43. † Page 45.

in proportion as ultra-democracy extends its dislocating and disturbing influences; and while "elevating the military state above the civil" in opinion, will lay the sure foundations of its predominance in real power.

Note V. (to Chapter XV.)

The great constitutional check upon the tyranny of majorities (the independence of the judiciary), referred to by Mr. Justice Kent in the following passage, has since, as we have seen, been entirely abolished in more than five-sixths of the individual States, and is threatened in the Constitution of the United States, by the course of events and of public opinion:—

"M. De Tocqueville is of opinion, that if the free institutions of America are to be destroyed, it will be owing to the tyranny of majorities driving minorities to desperation. The majority constitutes public opinion, which becomes a tyrant, and controls freedom of discussion and independence of mind. This is his view of the question, and English writers on the institutions of society in this country have expressed the same opinion. If there was no check upon the tyranny of legislative majorities, the prospect before us would be gloomy in the extreme. But in addition to the indirect checks of the liberty of the press, and of popular instruction, and of manners, religion, and local institutions, there are fundamental rights declared in the constitutions, and there are constitutional checks upon the arbitrary will of majorities, *confided to the integrity and independence of the judicial department.* M. De Tocqueville seems to be deeply impressed with the

dangers in a democracy, of the corrupting and controlling power of disciplined faction, and well he may be. The most dangerous and tyrannical of all crafts is party or political craft. The equal rights of a minor party are disregarded in the animated competitions for power, and if it were not for the checks and barriers to which I have alluded, this would fall a sacrifice to the passions of fierce and vindictive majorities."*

"Without independent judges," says Mr. Justice Story, "the Constitution would become a democracy with unlimited powers."†

Professor Lieber, in his work above referred to, "On Civil Liberty and Self-Government," denounces the practice of the election of judges by the people in the terms which it deserves:—

"As to the election of judges by the people themselves, which has now been established in many of the United States, it is founded, in my opinion, on a radical error—the confusion of mistaking popular power alone for liberty, and the idea that the more the one is increased, in so much a higher degree will the other be enjoyed; as if all power, no matter what name be given to it, if it sways as power alone, were not absolutism, and had not the inherent tendency, natural to all power, to increase in absorbing strength. All despotic governments, whether the absolutism rests with an individual or the people (meaning, of course, the majority), strive to make the judiciary dependent on themselves. Louis XIV. did it, and every absolute democracy has done it."‡ "Where the people are the first and chiefest source of all power, as is the case

* Kent's Commentaries, vol. i. p. 450.

† Story, vol. i. p. 482. Edit. of 1853.

‡ Page 184.

with us, the electing of judges, and especially their election for a limited time, is nothing less than an invasion of the necessary division of power, and a bringing of the judiciary within the influence of the power-holder."*

Against the practice of electing them for short periods only, and paying them "illiberal salaries," Professor Lieber directs some strong arguments, tending to prove that the result, however it may for a time be delayed, must ultimately be the inferiority of the character and abilities of those who occupy the judicial bench, the consequent jeopardy of true freedom, and the loss of that protection which every honest citizen has a right to expect from the upright and able administration of the law.

Note VI.

By chapter 9 of the Acts of Massachusetts, 1843, the Senate and the House of Representatives concurred in reducing the salaries of the principal public officers of the State, and among them, those of the judges of the Supreme Court (together with the State judges): the Chief Justice to 3000 dollars (£600), the Associate Judges of the Supreme Court to 2500 dollars.

In the inaugural address of Governor George N. Briggs for 1844, His Excellency dwells at some length, and with many expressions of public congratulation, on the great progress in wealth made by the small and naturally barren State of Massachusetts, especially in recent years, and he

* Page 185.

then turns, "from a sense of official duty," to the reduction of salaries made by the Act of the previous year. He refers to the 29th Article of the Bill of Rights, which says, that "it is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws and administration of justice. It is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit;" and accordingly, that "the judges of the Supreme Court should hold their offices as long as they behave themselves well, and that they should have *honourable* salaries, ascertained and *established* by standing laws."

The Governor then proceeds to show, that, "by the established laws of the Commonwealth," the above salaries had been respectively 3500 and 3000 dollars, and he argues with great energy, that "permanence in their appointments," and "honourable salaries," were both essential to the freedom and impartiality of judges, and that low and inadequate salaries are not "honourable" salaries. Their salaries, he says, had been left unchanged for sixty years, by "more than sixty* different Legislatures."

His Excellency warns the Legislature against the consequences of yielding to this "false economy," and intimates that it has its origin in party feeling and in motives of faction. "When the open and manly champions of equal and just laws sink into the designing advocates of party, and the divided masses range themselves under their selfish leaders, . . the morals of the community suffer, and liberty itself is endangered." . . "A majority which uses its power for mere party purposes, and

* Constitution of Massachusetts, March, 1780. First Act passed 28th November, 1780.

disregards the interests and tramples on the rights of the minority, is a despotism. It is no less odious and oppressive because it is wielded by many, instead of one hand."

In 1853 the salaries of the judges in twenty-one States ranged from 1200 to 2000 dollars (£250 to £400); in five, from 2000 to 3000 dollars; in four, from 3000 to 6000 dollars; in California, from 2000 to 10,000 dollars.

Note VII. (to Chapter XV.)

The excuse which I have commonly heard assigned for the increasing practice of taking away the appointment of judges from the Executive in the individual States, and giving it to the Legislature or to the people, is, that the power of appointment by the Executive was abused for political purposes or personal objects, and that the Executive could not, as a rule, be trusted to make these appointments with fairness, and with a paramount regard to the fitness of the individual for the duties of so important an office.

If this general imputation was unfounded, a great political wrong has been educed from great personal injustice. If it was true, it is a lamentable proof that political intrigue had, in many instances, placed in the position of the Executive of a State, men whose moral qualities rendered them undeserving of that high trust.

But the power of appointing judges is not the only power in reference to the administration of justice, of which it is sought to deprive the Executive in many of the individual States. A strong opinion appears to be gaining

ground, that it will be expedient also to deprive them of the power of pardon.

Dr. Lieber, at p. 164 of his work above quoted, thus expresses himself on this subject:—

"The only case in which our executives have a real vetitive [?] power, is the case of pardon, and most unfortunately it is used in an alarming degree, against the supremacy of law and the stability of right—both essential to civil liberty. I consider the indiscriminate pardoning so frequent in many parts of the United States, one of the most hostile things now at work in our country to a perfect government of law. In the only case, therefore, in which we have a real veto power, we ought greatly to modify it."

He pursues this question in a paper written by himself, and published by the Legislature of New York, and which he gives in his Appendix.* In this paper he goes into much detail with respect to the facts in the various States, the opinions of many persons of authority regarding them, and the suggestions made for some alterations which might guarantee the community against so serious an abuse. Also, after referring to the work of MM. De Tocqueville and De Beaumont, in 1832, in which they expose "the frightful abuse of the pardoning power in the United States in general," and after quoting a statement "that the New York Committee had ascertained that there are men who make a regular trade of procuring pardons for convicts, by which they support themselves," he does not hesitate to add the following grave accusations against the governor of one of the "large" States of the Union:—

"To this statement we have now to add the still more appalling fact, which we would pass over in silence if our

* Pages 390-408.

duty permitted it, that but a short time ago the governor of a large State—a State amongst the foremost in prison discipline—was openly and widely accused of having taken money for his pardons. We have it not in our power to state whether this be true or not, but it is obvious, that a state of things which allows suspicions and charges so degrading and so ruinous to a healthy condition of public opinion, ought not to be borne with. It shows that leaving the pardoning privilege, uncontrolled in any way, to a single individual, is contrary to a substantial government of law, and hostile to a sound commonwealth." *

To this he subjoins the following note:—

"While these sheets are passing through the press, the papers report that the governor of a large State has pardoned thirty criminals, among whom were some of the worst characters, at one stroke, on leaving the gubernatorial chair."

Among the conclusions which Dr. Lieber proceeds to draw are the following:—

"That a wide-spread abuse of the pardoning power exists, and has existed at various periods.

"That the abuse of the pardoning power produces calamitous effects.

"That the Executive in our country is so situated, that, in the ordinary course of things, it cannot be expected of him that he will resist the abuse, at least that he will not resist it in many cases."

The individual States are ever anxious to keep alive the memory of the fact that they are sovereign States. Many of them number upwards of a million of inhabitants; one upwards of three millions. At their head—the type of that sovereignty, the symbol of their independent exist-

* Page 397.

ence, the assertor of the majesty of their law, the representative of their dignity, collective and personal—is placed, by their suffrages, their executive officer, their Governor. Yet, throughout the Union, either calumny has basely cast upon many of those exalted public servants the accusation, that for the sake of obliging some political partisans, or for the sake of a few hundred dollars, they will recklessly throw back upon society its worst criminals; or a grave conviction is establishing itself in the public mind, of the necessity of removing from them the snare, arising either from the smallness of their incomes, or their precarious tenure of power, which tempts to such a degradation of themselves, and of the office they hold.

The salaries of the governors of thirteen States do not exceed 1500 dollars; of fifteen, from 1500 to 3500 dollars; of one, 4000 dollars; of one, 6000 dollars; of California, 10,000 dollars.

Note VIII. (to Chapter XVI.)

As introductory to some sound opinions of Mr. Justice Kent, on the subject of the transmission of property in the United States,* I add the substance of an elaborate note in which he traces the current of opinion upon that question in ancient and modern times.

"The transmission of property by hereditary descent, from the parent to his children, is the dictate of the natural affections, but the distribution among the children has greatly varied in different countries."

* Commentaries, vol. iv. pp. 374-381.

"If some have thought that a 'natural' equality 'belonged to the lineal descendants in an equal degree,' others have attached more importance to the fact of the eldest son being the "natural substitute for the want of a paternal guardian to the younger children.'"

"The law of Moses gave the eldest son a double portion."

"In Athens the males took equally, and were preferred to females."

"In Rome, the law of the Twelve Tables, in cases of intestacy, admitted equally males and females to the succession."

"After various changes, excluding and including females, Justinian, by his 118th Novel, admitted males and females to an equality in the right of succession to intestates, and preferred lineal descendants to collaterals.

"The law of descent in the provinces of France before the Revolution of 1789, was exceedingly various, and far exceeded in variety that of the several American States.

"In the southern provinces (*pays de droit écrit*) the succession to intestates was generally according to the 118th Novel of Justinian, to all the children, male and female equally.

"But in the other provinces (*pays coutumiers*) there was much difference even in the lineal line. In the 'Nouveau Coutumier de France et des Provinces, connues sous le Nom des Gaules,' it was stated that the customs amounted to 547. In some, the eldest son took the entire estate. In most of the provinces he was allowed advantages more or less considerable. In some, the married daughters were excluded; in others, unmarried daughters, as against male children. In the collateral line, the modifications and diversities of succession were infinite.

"The decrees of the Constituent Assembly of 15th March, 1790, and 8th April, 1791, first abolished the rights of primogeniture and preference of males, in the succession to intestates' estates, following in that respect the law of Justinian; and after a distressing series of changes, retrospective decrees, confusion, and injustice, the French law of succession was permanently regulated by the 'Code Napoléon;' following the 'Novel' of Justinian as to the doctrine of representation in the descending line (Code Civil, No. 739, 740, 745), but making the distribution compulsory in all cases.

"In many of the South German States, the Code Napoléon has been retained in force since its introduction by the French at the period of their conquests, as on the Rhine, in Luxemburgh, in the Grand Duchy of Nassau, and in parts of Westphalia.

"In Prussia and Austria the law varies greatly, inclining in some provinces more towards the retention of the inheritance by the eldest or one of the other sons, in other provinces towards its subdivision.

"In Denmark, by an ordinance of 1769, primogeniture gave a title to a moiety of the estate of an intestate."

"In Spain, the law of equal partition applies, except where estates are fettered by an entail, and as nearly all are, the law of equal partition is of comparatively little consequence."* . .

"In several of the American colonies, before the Revolution, the English law of primogeniture prevailed in the distribution of the estates of *intestates*. It prevailed in Rhode Island until the year 1770; and in New York, New Jersey, Virginia, the two Carolinas, and Georgia, until the Revolution; and in Maryland until 1715.

* Page 381.

"In Massachusetts, Connecticut, and Delaware, the eldest son of an intestate had only a double portion, and this continued in Connecticut until 1792, when the law giving the eldest son a double portion was repealed. In Pennsylvania, by the law of 1683, the law of primogeniture was abolished, but the Act still gave the eldest son a double portion, and so the law of Pennsylvania continued until 1794. The Act of Massachusetts, in 1692, did the same.

"In the 'Abstract of the Laws of New England,' published in 1655, it was ordered that inheritances, as well as personal estates, should descend to the next of kin of the intestate, assigning a double portion to the eldest son.

"The old New England laws spoke of this double portion as being 'according to the law of nature and the dignity of birthright.'"*

"The Ordinance of Congress for the government of the North-Western Territory,† provided that the estates, within the territory, of persons dying intestate, should go to the children, and the descendants of a deceased child, in equal parts. . . . But this law was to be subject to future legislative alteration, though it is presumed to be still the general law of descent in all those States and districts comprising what, in 1787, was the territory of the United States north-west of the river Ohio, except in the instances hereinafter mentioned."

"With respect to the general law regarding *the power of creating deferred estates*, it is the same in all the States of the Union, except New York, namely, 'that an executory device of real or personal estate is good (as in England) if limited to vest within the compass of twenty-one years after

* Mass. Historical Collections, vol. v. p. 178.

† 13th July, 1787.

a life *or lives* in being.' The only alteration made in the law of the State of New York by the revised statute of A.D. 1830, was that this statute will not allow the absolute power of alienation to be suspended for a longer period than during the continuance of *not more than two lives* in being at the creation of the estate."

"The English law allows of the limitation *to any number of lives in being*, and for twenty-one years and nine months afterwards."

Thus far as regards the general course of law on this subject in most of the civilised countries of the world in ancient and modern times. On the questions of social policy and abstract right involved in these various and opposite laws and customs, the opinions of men are likely to continue as various as the laws and customs themselves. On the one hand, it will be argued that the feeling of natural equity is better satisfied by the equal partition of inheritances. Also, when regarded from the political point of view, the practice of equal partition agrees more with the theory that an universal participation in political power is a matter of right, and not a question of expediency. On the other hand, it is denied that there is any such principle of natural equity involved, as to establish a right or a claim on the part of the children to an equal partition of the father's property; that it is a question of discretion, and of practical wisdom, with a view to the best interests and the ultimate welfare of the whole family; and that the experience of successive generations in any particular country is the index and the guide to the practice most suitable to that country. The practice of our own country is seen to tend to the accumulation of capital, and consequently to all that power, to all those vast enterprises, and to all those great achievements, which accumu-

lated capital can alone produce; it improves and extends agriculture, stimulates and sustains manufactures, diffuses commerce through every sea, and brings back to the doors of a whole nation, prosperity, independence, wealth, and every element of material comfort. In a higher point of view, it gives opportunities for the purest and most refined enjoyments, leads to the most elevated intellectual and moral culture, and carries forward civilisation to the utmost bound attainable under the guidance of and in subordination to that culture. The contrary practice of other countries, in its different degrees, is seen to lead to different results in many particulars. France presents one phase of the effect of the principle of the subdivision of inheritances, which is there compulsory. All independent centres of power and local influence have been swept away by that law, and consequently it has cost no great effort to extinguish her liberties. Under the operation of the same law, poverty has stricken the Grand Duchy of Nassau, the Grand Duchy of Luxembourg, the Rhine Provinces, and every portion of German territory where it prevails. Mr. Justice Kent states very fairly his own opinion upon the subject, which, while candid towards other countries whose law or custom differs from his own, admits the principle that, even in his own country, the custom of "keeping inheritances unbroken" is in a material point of view, desirable. There are very many persons in his country who do not hesitate to add that it would be desirable in a moral and political point of view also.

Mr. Justice Kent's words are:—

"The policy of the measure will depend upon circumstances, and is to be considered in reference to the state of society, the genius of the government, the character of the

people, the amount of cultivated land, the extent of territory, and the means and inducements to emigrate from one part of the country to another." . . .

He proceeds to say,—"without undertaking to form an opinion as to the policy of primogeniture under the monarchical government of England,"—that in his own country at least,—

"The extraordinary extent of unsettled territories, the abundance of uncultivated land in the market, and the constant stream of emigration from the Atlantic to the interior States, operate sufficiently to keep paternal inheritances unbroken. The tendency of these causes, as experience in the eastern States would seem to confirm, is rather to enlarge than to abridge them; and if the inheritance will not bear partition without injury to the parties interested, the eldest son in some of the States is allowed to elect to take the whole entail to himself, on paying to the other heirs an equivalent to their shares in money, and on his refusal, the same privilege is allowed to the other sons successively."*

Note IX. (to Chapter XVI.)

The above review of the actual state of the law of succession in the United States, suggests considerations to a certain extent at variance with the popular impressions on that subject.

It is undoubtedly true that the general practice in re-

* Pages 384-5.

gard to the succession of property in that country has, since the separation from England, been to distribute it by will among all the children. And to this practice, M. De Tocqueville, in one of the most instructive chapters of his masterly work (Chapter III., on the Social State of the Anglo-Americans), attributes that complete ascendancy of the democratic element, which, having first established itself in the old States of the east and south, has now embraced the whole west, where it must long bear sway without the shadow of a competitor. M. De Tocqueville expresses "astonishment that public writers, ancient and modern, have not attributed to the laws respecting succession a greater influence over the march of human affairs." He says that the legislator, after having disposed of that law, may, in reference to the basis of power, repose for ages; for after once giving the impulse to the movement the machine acts of its own accord. And with no disguised reference to the state of things in his own country, he represents the action of that principle "as dividing, distributing, scattering, property and power;" "pounding to pieces, or bursting into fragments everything that resists its passage; now raising itself up, now prostrate on the soil, until the only substance it presents to sight is that of a moving and impalpable dust, on which sits democracy."

That this is the true solution of the rapid spread of purely democratic legislation in all the individual States, as recorded by Mr. Justice Kent, in the passages I have quoted, and as seen in what has occurred since he wrote in 1844, there can be no room to doubt; and it remains for time to show how long a highly-conservative system of general government can consist with a thoroughly democratic political organisation of the individual States.

But other reflections are suggested by a reference to the actual state of the law as to successions in the United States, to which I venture to think that some force is to be attributed.

The power of entail still exists in all the States, almost precisely as in this country. One State only, New York, has adopted a limitation upon it, of no essential importance.

It has been seen (Chapter I.) how strongly the feeling in favour of entails prevailed in nearly all the States in the early days of their colonial history—in a few of them even more so than in the parent country; and that in some instances the law dividing the estates of intestates among all the children was not adopted until after the separation. The principle, moreover, of preferring the eldest son in those cases is still, to a certain limited extent, adopted in nearly all the laws of the individual States.

I think it is impossible to deny that these facts indicate the depth and tenacity of the old principle, and that there is something in it that clings to the convictions of men, notwithstanding the plausible theories of more general benevolence, and the sanguine hopes of better government and more diffused prosperity, by which they had been allured.

The fact is, that of late years some of the largest properties accumulated by commerce have, even in the northern States, been distributed by will, very much in accordance with the custom of primogeniture. In the southern States (I judge from the expressions of many gentlemen from that part of the country) no secret is made of the desire to counteract the united effects of the modern law as to intestacy, and the course of events, by keeping the old family estates as much as pos-

sible unbroken. And it is open to every traveller in the United States to observe how completely the rapidly-accumulating wealth, arising from the vast resources of that country, gives to the social life of the actual possessors of wealth, all, or nearly all, the characteristics that it could have in that country under the most rigid custom of primogeniture.

M. De Tocqueville speaks with evident regret of the consequences of the law or custom of subdivision of inheritances, in destroying family attachments to places and people; in removing "an imperishable witness of the past and a precious pledge for the future;" in extinguishing one great stimulus to perpetuate virtue and renown; in dissipating the laboriously-collected stores of cultivation and refinement, and obstructing the onward progress of the highest civilisation, by continually compelling steps that had been already gained to be retraced anew.

He attributes to it, also, a deeper moral taint, and a greater wrong to the highest interests of mankind. He says, and says truly, that when you have destroyed in the minds of the wealthy and prosperous all those more elevating influences which can so powerfully affect the human heart, you leave it to be absorbed by selfishness, or to limit its sympathies within the narrow field of one generation. And when you have removed all the higher objects of love and reverence, and all the purer incentives to exertion, you leave little more than the basest of all incentives, the love of money.

Strong is the language of Goldsmith in denouncing those who,

> "polluting honour at its source,
> Give wealth to sway the mind with double force."

In this country we hold the united benefits derived from

all the inheritances of antiquity and all the material, intellectual, and moral conquests of modern times, by the tenure of making them all subservient (as far as human wisdom permits) to the highest interests and the individual happiness of the whole body of the community.

Note X.

I have said in the text (pp. 23, 86) that there is no need to repeat the well-known refutations of those theories which rest the claim to a participation in political power on "the rights of man." The full discussion which these abstract questions of government underwent at the end of the last century has finally disposed of them as matters of practical value, in the convictions of all educated men in this country. But no one can be conversant with the sort of literature which for the last twenty years has been addressed to the passions, and which takes advantage of the comparative want of knowledge of large masses of our population, without seeing in it another example of the facility with which exploded errors can be revived among a new generation unacquainted with their previous existence. I therefore offer this circumstance as the excuse for the length of the following extracts. It is not every one who may chance to read this volume who has at hand the writings of those who dealt with these questions when, in the last century, they agitated the whole of Europe. And I venture to hope that no one will object to see, in connection with the subject of this book, a few of those passages which were bequeathed to the admiration of posterity

by orators and statesmen who have placed the foundations of our own political system on the basis of true philosophy and irrefragable reasoning.

The following is the eloquent exposition of Burke, of the *real* rights of man, in contradistinction to his pretended rights, as a member of civil society:—

"The pretended rights of these theorists are all extremes; and in proportion as they are metaphysically true they are morally and politically false. The rights of men are a sort of *middle*, incapable of definition, but not impossible to be discerned. The rights of men in governments are their advantages; and these are often in balances between differences of good; in compromises sometimes between good and evil, and sometimes between evil and evil. Political reason is a computing principle; adding subtracting, multiplying, dividing, morally, and not metaphysically or mathematically, true moral denominations.

"By these theorists the right of the people is almost always sophistically confounded with their power. The body of the community, whenever it can come to act, can meet with no effectual resistance; but until power and right are the same, the whole body of them has no right inconsistent with virtue, and the first of all virtues, prudence. Men have no right to what is not reasonable, and to what is not for their benefit.

"Whilst they are possessed by these notions it is vain to talk to them of the practice of their ancestors, the fundamental laws of their country, the fixed form of a Constitution whose merits are confirmed by the solid test of long experience and an increasing public strength and national prosperity. They despise experience. . . . . They have the 'rights of man.' Against these, they say, there can be no prescription; against these no argument

is binding; these admit no temperament and no compromise; anything withheld from their full demands is so much fraud and injustice. Against these, their rights of men, let no Government look for security in the length of its continuance, or in the justice and lenity of its administration. The objections of these speculatists, if its forms do not quadrate with their theories, are as valid against an old and beneficent Government as against the most violent tyranny or the greatest usurpation. They are always at issue with Governments, not on a question of abuse, but a question of competency and a question of title. . . . .

"Far am I from denying in theory—full as far is my heart from withholding in practice (if I were of power to give or to withhold)—the *real* rights of men. In denying their false claims of right, I do not mean to injure those that are real, and are such as their pretended rights would totally destroy. If civil society be made for the advantage of man, all the advantages for which it is made become his right. It is an institution of beneficence, and law itself is only beneficence acting by rule. Men have a right to live by that rule; they have a right to do justice, as between their fellows, whether their fellows are in politic function or ordinary occupation. They have a right to the fruits of their industry, and to the means of making their industry fruitful. They have a right to the acquisitions of their parents; to the nourishment and improvement of their offspring; to instruction in life, and consolation in death. Whatever each man can separately do, without trespassing on others, he has a right to do for himself; and he has a right to a fair portion of all which society, with all its combinations of skill and force, can do in his favour. In this partnership all men have equal rights,

but not to equal things. He that has but five shillings in the partnership, has as good a right to it as he that has five hundred pounds has to his larger proportion. But he has not a right to an equal dividend in the produce of the joint stock; and as to the share of power, authority, and direction which each individual ought to have in the management of the State, that I must deny to be amongst the direct original rights of man in civil society; for I have in contemplation the civil man, and no other. It is a thing to be settled by convention.

"If civil society be the offspring of convention, that convention must be its law. That convention must limit and modify all the descriptions of constitution that are formed under it. Every sort of legislative, judicial, or executory power are its creatures. They can have no being in any other state of things; and how can any man claim, under the conventions of civil society, rights which do not as much as suppose its existence—rights which are absolutely repugnant to it? One of the first motives to civil society, and which becomes one of its fundamental rules, is, that no man should be judge in his own cause. By this each person has at once divested himself of the first fundamental right of uncovenanted man, that is, to judge for himself and to assert his own cause. He abdicates all right to be his own governor. He inclusively, in a great measure, abandons the right of self-defence, the first law of nature. Men cannot enjoy the rights of an uncivil and of a civil state together. That he may obtain justice, he gives up his right of determining what it is in points the most essential to him. That he may secure some liberty, he makes a surrender in trust of the whole of it.

"Government is not made in virtue of natural rights,

which may and do exist in independence of it, and exist in much greater clearness, and in a much greater degree of abstract perfection; but this abstract perfection is their practical defect. By having a right to everything, they want everything. Government is a contrivance of human wisdom to provide for human *wants*. Men have a right that these wants should be provided for by this wisdom. Among these wants is to be reckoned the want, out of civil society, of a sufficient restraint upon their passions. Society requires not only that the passions of individuals should be subjected, but that even in the mass and body, as well as in the individuals, the inclinations of men should frequently be thwarted, their will controlled, and their passions brought into subjection. This can only be done *by a power out of themselves*, and not, in the exercise of its function, subject to that will and to those passions which it is its office to bridle and subdue. In this sense the restraints on men, as well as their liberties, are to be reckoned among their rights. But as the liberties and the restrictions vary with times and circumstances, and admit of infinite modifications, they cannot be settled upon any abstract rule; and nothing is so foolish as to discuss them upon that principle.

"The moment you abate anything from the full rights of men, each to govern himself, and suffer any artificial positive limitation upon those rights, from that moment the whole organisation of government becomes a matter of convenience. This it is which makes the Constitution of a State, and the due distribution of its powers, a matter of the most delicate and complicated skill. It requires a deep knowledge of human nature and human necessities, and of the things which facilitate or obstruct the various ends which are to be pursued by the mechanism of civil institutions. . . .

"Nor is it a short experience that can instruct us in that practical science; because the real effects of moral causes are not always immediate, but that which, in the first instance, is prejudicial, may be excellent in its remoter operation, and its excellence may arise even from the ill effects it produces in the beginning. The reverse also happens; and very plausible schemes, with very pleasing commencements, have often shameful and lamentable conclusions. In States there are often some obscure and often latent causes, things that appear at first view of little moment, on which a very great part of its prosperity or adversity may most essentially depend."*

Sir James Mackintosh, in the maturity of his great powers, gave his full adherence to the principles established in this profound and comprehensive exposition of the foundation of political government. Speaking of those abstract rights above adverted to, he says, that "such remote principles shed too faint a light to guide us on our path, and can seldom be directly applied with any advantage in human affairs." He proceeds to describe representation as originating only in usage, that usage giving birth to maxims which guide our judgment in each particular case, and which grow with the experience of their fitness and value. "These," he affirms, "constitute the principles of the British Constitution, as distinguished, on the one hand, from abstract notions of government, and, on the other, from the provisions of law or the course of practice. 'Civil knowledge,' says Bacon, 'is of all other the most immersed in matter, and the hardliest reduced to axioms;' and in political, as well as all other knowledge, 'the middle principles alone are solid, orderly, and fruitful.'"†

* Reflections on the Revolution in France. Burke's Works, Edit. of 1852, (Rivington,) pp. 198, 201.

† Sir James Mackintosh's Works, vol. iii. p. 574, Edit. of 1846.

NOTE XI. (See pages 99 and 273.)

Much more might be said beyond what I have thought it necessary to introduce in the pages above referred to, on the subject of the representation in the Slave States, the franchise of the free coloured people in the northern States, and the small amount of the actual participation of the latter in the political rights and privileges of their fellow-citizens. I, however, designedly abstain from the subject of slavery altogether. I greatly respect the motives of those persons, many of them of high position and great influence in this country, who think, and are supported in that opinion by many persons in the United States, that the continual expression of the opinion of this country and of Europe generally on the question of slavery, aids what is called the Abolition Party, and therefore hastens the time when slavery will be no more. I have the strongest conviction, founded on what I know to be the opinions of many of the best, the ablest, the most far-seeing, and most benevolent persons in the United States,—founded, also, on the facts of the history of this question, and on what is passing at the present time, —that this is an error.

It is impossible that any amount of reasoning, any amount of vituperation, can add a feather's weight to the already almost overwhelming sense of difficulty and danger which presses upon the thoughts of every individual statesman or man of intellect and cultivation in the United States, be he slave-holder or not, when he gives his mind to a calm survey of what is impending over his country in

relation to that momentous question. Less than thirty years hence there will probably be nearly 6,000,000 slaves to be dealt with instead of 3,200,000,* with all the added difficulties arising from increased intelligence and means of combination, which it will be impossible to shut out. The general vituperation launched at the system passes by the heads of those who will tell you that they live among their slaves as a father among his children; that they trust unhesitatingly to their care their property, their persons, and those of their wives, their grown-up daughters, and their infants; and it is laughed at by the hardened reprobates who profit by the worse features of the system, and its occasional dreadful incidents. Harrowing descriptions, lofty denunciations, elaborate arguments, are not needed by the one, and are scoffed at by the other. But they are something more, and something worse, than not needed.

Of the many agreeable sensations, and unexpected and most gratifying convictions with which I was impressed during my visit to the United States in 1851, one of the most unexpected and most gratifying was that of finding how deep, how sincere, and how general was the natural feeling of kindliness, of respect, and affection, of all persons of any amount of culture and information, towards the parent country. The hostile and irritating criticisms of the press on both sides the water; the social and political theories, so opposed to ours, under which they live; the remembrance of all they had suffered from our impolicy, our arrogance, and our injustice, in the last cen-

* The present rate of increase of the slave population, according to the census of 1850, is 28·05 per cent in ten years. In the previous ten years, from 1830 to 1840, the rate of increase was only 23·8 per cent.

tury, and our unhappy collisions in the early part of this, have not been able to sever the ties of those natural affections which bind them to their birthplace, and to the sources of all they deem most precious in their inheritance from the past. Towards everything which, in this country, we are accustomed to regard with respect, I found all such persons in that country disposed to look with an equal respect, and as ready to derive from them the improving influences which we believe them capable of diffusing through the great body of society. Approached, therefore, in the spirit of mutual respect, of brotherly kindness, of friendly openness and frankness, there is no subject on which an American of any cultivation is not most ready to enter, with a disposition to look at and consider it from the point of view in which it is regarded in England. His sympathies are already with us; we have but to acknowledge and to respond to them. The violent and unscrupulous portion of the press in his country (the worst being conducted or inspired by renegades from ours,) may, and doubtless does, produce a very different state of feeling and opinion in the numerical mass; but the expanded hearts and minds of the educated, the reflecting, the cultivated, in their various degrees, are untrammelled by any such unworthy influences, and meet us fully half-way in any demonstrations of genuine respect and fraternal recognition. But in equal measure do their spirits revolt against assumption. And all the more keenly, in proportion to their desire to be understood aright, do they feel the unkind criticism, the over-coloured description, or the repelling sneer.

The effects of these latter upon the less cultivated are to stimulate to undue assumption on their part, and to produce that exaggerated degree of self-assertion, from the

fear of being undervalued, which is the subject of remark in Europe.

The number of persons kindly affected towards us in the United States is, I am persuaded, very considerable, and embraces a very large proportion of all that is most cultivated and most estimable in that country. And upon them, I have not the shadow of a doubt—and my convictions are founded upon correspondence, upon personal intercourse, and upon what I have heard from the best sources—that the proceedings of the last two years in England, relative to the slavery question, have produced the most unfortunate and most undesirable impression, and have, as far as they have been operative at all, retarded, instead of advancing, the time when it will be possible to reopen that question in the Slave States with a view to its solution.

It is unfortunate that persons in this country, whom there is every disposition to respect, should throw away their natural influence with the better-disposed classes in the United States, by what is looked upon by so many among them as an unwarrantable assumption. On wider grounds it is still more to be lamented, in its effect in keeping up and increasing that coldness and alienation, and that exaggerated self-assertion, above adverted to as common among the less cultivated of their population. Both these effects are bad enough in a social point of view, but may be still worse in their national consequences, as predisposing to national irritations, and making them more difficult to be allayed. But beyond and above these incidents to that course of proceeding lies a reason against such interferences, especially from this country, which is very generally overlooked, but which is of much weight in the estimation of those most nearly concerned—it is, that each of the individual States is, and never allows it to be

forgotten that she is, a sovereign State, and as such is ever jealously on the watch against any interference or dictation from without in any shape. No amount of agitation in the rest of the United States, or in any part of the world whatsoever, against anything that concerns her internal policy, can have any effect in compelling her against her will to alter that policy; and the greater the agitation directed against her, the more obstinately will she resist all movement until she can exercise her own discretion in taking the initiative with calmness and in her own way. To adopt a less sturdy course would, they think, be to renounce their Saxon descent and character; some will add perhaps even more than that, for, judging from those I met with, there is scarcely one of the sons of the old southern States who hesitates to tell you that they have not got some of the best blood of England in them for nothing. They will remind you that the movement in New York and Pennsylvania, which ended in abolishing slavery in those States, in 1819, began within themselves, as had been the case before in New Hampshire, Massachusetts, Vermont, and Ohio. They will point to Virginia and Kentucky, where, years ago, measures for continuing or granting facilities for emancipation were all but carried; and to Maryland, where, as well as in Virginia and Kentucky, it is notorious that the value of the land would be trebled were the slaves which taint their soil, and repel the labour and capital of the north, gradually set free by Acts of their Legislatures. They will remind you, that those movements, which were so nearly being successful in the two States above-named, were spontaneous, and emanated from themselves; and that they were checked in mid career, and further progress made for a time

impossible, by the irritation of feeling produced by the attacks, the taunts, and the interference of the Abolitionists. But much as they resent the interference of their fellow-countrymen, still more do they resent ours, when obtruded upon them in a spirit of superiority, and as if we had a right to take them to task.

There is a spirit, however, in which they will thank you if you will enter upon this great question with them. Sit down with them, and count the cost. Look at the appalling subject in all its vast and complicated bearings. Feel for them, as you cannot fail to do, at the hideous problem that lies before them. Feel with them at their stupendous difficulties. Aid them with the whole stretch of your mind and the whole force of your ability, as you would a brother. Point out every "lane of open water" that may seem to lead through that worse than polar agglomeration. Consider with them what expedients may smooth the way for, what palliatives may mitigate, the crisis. Suggest the little that may have been good in the experience of your own country, and recall to mind the wiser counsels that were neglected and the hopeful opportunities that were lost. Be humble in your anticipations of being a useful counsellor, in the recollection of your own errors. Believe that those on whom the heavy weight of the solution must press day and night must know something about it, and of the times and seasons when to take it in hand. Soften down the asperities you may before have had a hand in causing; help to bury them in oblivion; encourage the opening of a new page, and the commencement of action from a new starting-point. Let it henceforward be a question not of general reasoning and declamation, but of practical detail. Bend all the energies of

your mind upon that; and implore an All-wise Providence to look with compassion upon the past, and to bless the efforts for a better future.*

* The first disturbances, produced by the measures of the Abolitionists, took place in New York, in 1834. In 1835, lawless proceedings against persons belonging, or supposed to belong, to that party, occurred in Baltimore, New Orleans, and in the States of Mississippi and Missouri. In 1837, President Van Buren, the first who in his public addresses adverted to the question of slavery, expressed his determination "to resist the slightest interference with it in the States where it exists." The continued agitation of the subject, and the efforts of the Abolitionists to facilitate the escape of slaves, produced, in 1850, the Fugitive Slave Law, which has given tenfold bitterness to the feelings of the north, and roused the south to declare that its repeal will be followed by a dissolution of the Union. How is it possible, until these feelings are quieted on both sides, that any real and vigorous efforts can be made even in those slave States which once manifested a desire to lead the way in the further progress of abolition?

In two at least of them the current has now completely turned. Kentucky, in 1850, by a vote of 71,563 for, and 20,302 against; Maryland, in 1851, and Virginia in 1851, by a vote of 75,748 for, and 11,060 against, adopted ultra-democratic constitutions (every free white male of 21 years of age, resident from six months to two years, having a vote); yet, in the two last, the General Assembly is altogether restricted from emancipating. In Kentucky, the consent of the owner is required, or the payment of a full equivalent, and the removal of those emancipated from the State, the latter provision adding greatly to the cost and difficulties. I take the above figures from "The American Almanack" (Boston), a very useful compilation, to which I am much indebted.

Note XII.

The expression in the text (p. 298), that the Constitution of the United States is commonly asserted in that country to be, in popular phrase, "the best in the world," is too well supported by every-day facts to need any justification; but, perhaps, a few instances, showing that the expression has been countenanced by high authorities, may not be without their value.

President Munroe, in his "Message" of 1826, speaks of the institutions of the United States as "the happiest the world ever knew."

President Harrison, in his Address of 1841, describes their institutions as "far exceeding in excellence those of any other people."

President Filmore, in his "Message" of 1852, asserts that their Constitution, "though not perfect, is, doubtless, the best that was ever formed."

A very useful little volume on "The Constitution of the United States," with a "descriptive account of the State Papers and other Public Documents" relating to it, by Mr. W. Hickey,* has now reached its fourth edition. Prefixed to it are copies of several resolutions of the Senate, ordering the purchase and distribution of upwards of 24,000 copies of this work. In the "Introductory Remarks," p. xxxiv, Mr. Hickey, speaking of the President and the members of the two Houses of Congress, uses the following words:—

"The intrinsic dignity of whose official character, in a

* Philadelphia, 1851.

moral point of view, transcends that of every other legislative assembly, in so much as our Constitution excels that of every other human government."

I am far from referring to it as a matter of complaint that the citizens of the United States should think and speak of their Constitution as "the best in the world." I only wish to guard myself against being thought in the least degree to have exceeded the strict truth, in alleging that such is their claim, not to say, boast; and that they therefore challenge all legitimate criticism, and every fair exposition of facts which show how far their present practice and experience under that Constitution corresponds with its letter and spirit.

Very different was the language of Washington in speaking of that document, when, in a letter to the President of the Congress,* he recommended its acceptance.

His words are, "that it is liable to as few exceptions as could reasonably have been expected, we hope and believe."

To the same effect, also, are his sentiments in the extract given last in this note.

The wisdom of the truly great men who framed the Constitution was too enlarged not to include the attribute of humility, under the consciousness of human imperfections; and their knowledge was too comprehensive and real, not to show them difficulties and dangers on the vast field of political science, which lie beyond the horizon of inferior minds. Therefore—in the same sober spirit, as his great predecessor—the second President of the Republic, John Adams, in his inaugural address,† speaks of the Constitution "as an experiment;" "better adapted,"

* September 17, 1787. † March 4, 1797.

indeed, "to the genius, character, situation, and relations of this nation and country, than any which had ever been proposed or suggested," but not therefore the best in the world, and for every one in it. And in a similar tone are the inaugural addresses of the two next Presidents, Jefferson and Madison, who were the contemporaries of the great struggle, and were content to indulge large hopes from the form of government that resulted from it, without therefore pronouncing their own work the most perfect or the only perfect effort of political wisdom.

There is, perhaps, no State paper ever written, more remarkable, more touching, more eloquent, more full of pregnant thoughts and wise counsels, than "The Farewell Address of George Washington, President, to the People of the United States, September 17th, 1796," on his retiring into private life after his second presidentship. I venture to extract a few passages, not only on account of their intrinsic excellence as specimens of true political philosophy, but as directly applicable to many of the subjects discussed in the text, on the changes that have ensued, since those days, in the practical working of the Constitution:—

"Towards the preservation of your Government, and the permanency of your present happy state, it is requisite, not only that you steadily discountenance irregular oppositions to its acknowledged authority, but also that you resist with care the spirit of innovation upon its principles, however specious the pretexts. One method of assault may be, to effect, in the forms of the Constitution, alterations which will impair the energy of the system, and thus to undermine what cannot be directly overthrown. In all the changes to which you may be invited, remember that time and habit are at least as necessary to fix the true

character of governments, as of other human institutions; that experience is the surest standard by which to test the real tendency of the existing constitution of a country; that facility in changes, upon the credit of mere hypothesis and opinion, exposes to perpetual change, from the endless variety of hypothesis and opinion; and remember, especially, that for the efficient management of your common interests, in a country so extensive as ours, a government of as much vigour as is consistent with the perfect security of liberty, is indispensable. Liberty itself will find in such a government, with powers properly distributed and adjusted, its surest guardian. It is, indeed, little else than a name, where the government is too feeble to withstand the enterprises of faction, to confine each member of the society within the limits prescribed by the laws, and to maintain all in the secure and tranquil enjoyment of the rights of person and property."

. . . . . .

"The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism. A just estimate of that love of power, and proneness to abuse it, satisfy us of the truth of this position. The necessity of reciprocal checks in the exercise of political power, by dividiug and distributing it into different depositories, and constituting each the guardian of the public weal, against innovations by the others, has been evinced by experiments, ancient and modern; some of them in our own country, and under our own eyes. To preserve them must be as necessary as to institute them. . . . Let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The

precedent must always greatly overbalance, in permanent evil, any partial or transient benefit which the use can at any time yield." . . .

"Observe good faith and justice towards all nations, cultivate peace and harmony with all; religion and morality enjoin this conduct, and can it be that good policy does not equally enjoin it? It will be worthy of a free, enlightened, and, at no distant period, a great nation, to give to mankind the magnanimous and too novel example of a people always guided by an exalted justice and benevolence. Who can doubt that, in the course of time and things, the fruits of such a plan would richly repay any temporary advantages which might be lost by a steady adherence to it? Can it be that Providence has not connected the permanent felicity of a nation with its virtue? The experiment, at least, is recommended by every sentiment which ennobles human nature. Alas! is it rendered impossible by its vices?"

. . . . . .

"The great rule of conduct for us, in regard to foreign nations, is, in extending our commercial relations, to have with them as little political connection as possible."

. . . . . .

"Europe has a set of primary interests, which to us have none or a very remote relation. Hence she must be engaged in frequent controversies, the causes of which are essentially foreign to our concerns. Hence, therefore, it must be unwise in us to implicate ourselves by artificial ties, in the ordinary combinations and collisions of her friendships or enmities."*

. . . . . .

* Washington urges this advice in several other paragraphs, terminating in a recommendation to his countrymen to keep them-

"In offering to you, my countrymen, these counsels of an old and affectionate friend, I dare not hope they will make the strong and lasting impression I could wish; that they will control the usual current of the passions, or prevent our nation from running the course which has hitherto marked the destiny of nations; but if I may ever flatter myself that they may be productive of some partial benefit, some occasional good; that they may now and then recur to moderate the fury of party spirit, to warn against the mischiefs of foreign intrigues, to guard against the impostures of pretended patriotism; this hope will be a full recompense for the solicitude for your welfare by which they have been dictated."

Note XIII.

In Washington's Farewell Address above quoted, occurs the following passage on the value of religious principles:—

"Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism, who should labour to subvert those great pillars of human happiness, those foremost props of the duties of

selves, by suitable establishments, on a respectable defensive posture. "Upon the danger to liberty," and particularly to "republican liberty," from large military establishments, which necessarily follow a state of hostilities at home or abroad, he had dilated in a previous page.

men and citizens. The mere politician, equally with the pious man, ought to respect and to cherish them. A volume could not trace all their connections with private and public felicity. Let it simply be asked, where is the security for property, for life, if the sense of religious obligation desert the oaths which are the instruments of investigation in courts of justice? And let us with caution indulge the supposition, that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principles."

On the great experiment that is now in progress in the United States on that momentous question, I have ventured to touch in a previous volume.*

The adoption of any one form of religion by the State being impossible in that country, it has been thought equally impossible by some, it has been deemed undesirable by others, that any religious instruction involving points of doctrine should be taught in the schools established by the laws and supported by the funds of the community. It is assumed, that the doctrines of religion will be taught at Sunday schools, by the paid ministers of each religious denomination, aided by voluntary teachers, attending at the Sunday schools for that purpose.

As this question has become one which must be thoroughly and deeply considered in this country, I availed myself of such opportunities as I could command during a short tour in the United States in 1851, to inquire into its practical working in the public schools there.

* Notes on Public Subjects, &c.

For that purpose, I visited various public schools in New York, in Philadelphia, in country villages in the interior of Pennsylvania, in Pittsburgh on the Ohio, in Cincinnati, in Cleveland on Lake Erie, in the State of Rhode Island, and finally, in Boston. In every instance, I was aided in my inquiries either by the superintendents of public instruction, or by the masters of the schools, and in some instances by both together. The facts were gathered from the state of the schools exactly as I found them, without preparation, and without their being previously aware either of my visit, or of the nature of the facts which I wished fairly to ascertain. The result was as I have stated it in the volume above referred to, namely, that of the pupils attending the day-schools, in some cases a large, in others a small, but generally a very considerable proportion, "either did not attend any Sunday school, or did so only very irregularly."

The only hostile criticism upon those statements, which has come under my notice, has been directed against the information given me respecting the Sunday schools at Lowell, by the Rev. Dr. Edson, for twenty-seven years past the rector of a church at Lowell, and a gentleman held in the highest estimation by all his neighbours. Dr. Edson, after giving me his reasons for having arrived at the conviction that the public-school system had "already undermined" among their population, "to a great extent," the doctrines and principles of Christianity, stated to me his belief "that less than half of the whole number of children (at Lowell) between the ages of five and sixteen attend any Sunday-school, or do so only most irregularly."

This statement of Dr. Edson's excited great attention at Boston and in the State of Massachusetts generally, and was subjected to violent attacks in some of the public papers. An inquiry was very soon instituted by the

Board of Education, throughout the State, and the result was, I am informed, that the children at the day-schools who did not attend at some Sunday school were found, at that time, to constitute a very small per-centage of the whole. Without entertaining the slightest particle of suspicion that such a result was unfairly obtained, I confess its purport does not in the least surprise me, considering how probable it is that many parents would have been awakened to the propriety of sending their children to Sunday school by the discussion that had arisen.

I beg, however, again to call attention in this country to some additional evidence since furnished to me by Dr. Edson, which, as it rests upon public documents, will scarcely admit of dispute.

These documents are:—1. "The Annual Report of the School Committee of the City of Lowell, for 1852, with a Summary of Returns;" 2. "The Annual Report of the Lowell Sabbath School Union." Of this latter document Dr. Edson says:—"This Union is a voluntary association for the benefit of Sunday school instruction, and comprehends fifteen out of twenty-four Sunday schools in the city. The schools not associated are—the Roman Catholics, who have three schools; the Unitarians, two; the Universalists, two; and two not connected with any particular form of religion, and claiming not to teach any particular religion. I have not the numbers connected with the nine schools not associated, but I have reckoned them, by a large estimate, at the average number attending the associated schools."

Dr. Edson then subjoins the following Table, completed by estimates on the above-named basis. It will be seen that it bears out in a remarkable manner, and almost to the letter, the statement which he made to me as the result of observation only, namely, that less than half of

the whole number of children between five and sixteen (in Lowell) attend the Sunday schools.

"According to the summary appended to the Annual Report of the Lowell School Committee, the total number of pupils in the time-books from January, 1851, to January, 1852, was 9012

Subtract 'sent to other public schools of same rank,' because these names are repeated in the time-book . . .	636	
Subtract also 'sent from primary to grammar schools,' for the same reason .	629	
Subtract 'sent from grammar-schools to the high school'	129	
		1394
Total number of pupils attending the day-schools for the year 1852 . . .		7618

"According to the report of the Sabbath School Union for 1852, in the statistical column 'under fifteen years of age,' and filling the blanks with estimates derived from the average of schools reported of the same persuasion, the total number of children under fifteen in those schools for the year 1852 . . . . . 1947 + 348 = 2295

Add for schools not associated—namely, Roman Catholics, 3; Unitarians, 2; Universalists, 2; of no particular religion, 2; 9 schools—estimated number of pupils therein, under 15, according to the average of schools reported	1377
Add for such pupils above 15 in the public schools as may be in Sunday schools (estimated)	204
Total number of pupils attending the Sunday schools, according to statistics and estimate	3876"

Dr. Edson's statement to me, founded on general observation, was, "that less than half of the whole number of children (at Lowell) between the ages of five and sixteen attend any Sunday school, or do so only most irregularly."

Multiplying the above number of 3876 by two, will give 7752.

The number 3876, therefore, exceeds the half of the number 7618 by 134 only (7752 — 7618 = 134); and Dr. Edson's statement to me, with regard to the attendance at Sunday schools being less than half of that at the day-schools, is proved to be almost literally correct, by the published statistics of the day and Sunday schools of Lowell, completed by fair and liberal estimates.

"It will be seen," Dr. Edson adds, "by perusal of the Report of the Sabbath School Union, that the tendency of each particular school is to report itself large. It is but the natural result of a laudable emulation of the schools between themselves to report as many as circumstances will justify, and of course to include those pupils whose attendance is but very irregular and of inconsiderable amount.

"It may be remarked also that there are included in the 3876, pupils privately educated, or otherwise not belonging to the public schools. If these were added to the 7618, it would somewhat affect the ratio of the two numbers," in the way of further confirmation of Dr. Edson's calculations.

When it is remembered how much it is the custom among the upper and middle classes in the United States to send their children to the Sunday schools, and to attend themselves as teachers, it is perfectly safe to infer that the great majority of those who neglect to send their children, belong there, as in this country, to the least educated portions of society.

By these latter, secular education is, in England, coming more and more to be regarded almost in the category of material wants, since it is found to be one of the best instruments towards supplying them. Such persons will send their children to the day-school to obtain the small amount of common learning which they think necessary, and withdraw them at the earliest possible age at which this can be attained. And the better the school, generally speaking, the earlier the age at which the majority of such children leave it. After that period, neither schoolmaster, nor clergyman, nor dissenting minister, can feel the least certainty that he will ever see anything more of them again as far as education is concerned, secular or spiritual. If the few early years of secular instruction are not seized upon, to impart at the same time all the elementary principles of Christian doctrine, and to make the first impressions in favour of a firm Christian belief, where is the probability that the great majority of those who most need such early training and direction will ever obtain it? Even if the whole were gathered into Sunday schools, which is beyond all expectation, who is to teach them? The clergy are already overburdened, and greatly too few to meet the present demands upon them. The voluntary teachers, whatever may be their zeal, cannot be expected, except in comparatively rare instances, to possess that command of elementary knowledge and that tact in using it, which are indispensable, if teaching is to be impressive and successful. And if these elementary principles of a firm Christian belief are not fixed early in the mind, according as they are understood by the church or sect to which the child belongs, the progress is direct and rapid, first to indifference to any, and then to the rejection of all. That this process is going on in the United States, as the direct

result of their public-school system, is the opinion of many portions of the principal religious bodies—in particular the Roman Catholics, the Church of England, and the old Presbyterians or Puritans—irrespective of mere party views; although at the same time the belief is common that no other system of general education in that country is possible. It is an experiment from which, touching as it does the foundation of "those great pillars of human happiness, religion and morality," to use the words of Washington, we should do well to abstain. *

* In some remarks on my book, "Notes on Public Subjects," &c., in the "Westminster Review" for April, 1853, it is imputed to me that the information which I gave upon this subject in that volume was collected "under the influence of the ultras of the high-church party and my own bias." I beg, in the first place, utterly to disclaim any bias towards the high-church party; and in the next, I assert that my information was collected indiscriminately from a great variety of persons, and without the least attempt at inquiry as to, or any knowledge of, the tenets of those who gave it or assisted me in procuring it.

It is further said, "that Mr. Tremenheere has been very careless, to say the least of it, in adducing authorities. Thus in enumerating his adverse testimonies, he represents the Bishop of Massachusetts as saying, that he would prefer, in the interests of religion, a mixture of religious with secular teaching, but that this is not attainable. But we are assured by the Bishop that he was misreported. Being asked whether he would not prefer having the schools more under his control, he said 'Yes,' but added, 'that this was impossible, and that he *was quite satisfied with the working of the present system*,' of which satisfaction we are not favoured with a hint."—*Westminster Review*, April, 1853, p. 515.

In confirmation of the correctness of my own statement, and in opposition to that of the writer of the review, I appeal to the answer given by the Bishop to Mr. Twisleton, printed in the Appendix to the Report of the Select Committee on Manchester and Salford Education (1852), p. 492; which answer, verified by the Bishop's signature, together with the question, was as follows:—

Note XIV.

It would be easy to quote from public documents of the United States proofs of extravagant expenditure sanctioned by Congress, and something more than extravagant

"Question 5.—Generally, do you approve or do you disapprove of that system? and what are the main grounds on which your approbation or disapprobation of it is founded?

"Answer.—Although I individually should prefer arrangements under which the tenets of my own Church were directly taught in the common schools, yet, on the whole, I approve of the present system, because it ensures the means of providing a more efficient system of instruction than could permanently be maintained for all the children of the commonwealth in any other way."

The approval of the right reverend gentleman is thus shown to be founded, not on religious grounds, but on the fact that in his opinion a more efficient system of instruction could not be permanently maintained for all. This is very different from an assertion that he "was quite satisfied with the working of the present system."

A writer in a periodical has stated that I was only two days in Boston, and therefore had no right to give an opinion upon the schools there or in that neighbourhood. I was in Boston eleven days, from the 25th to the 27th of August, and from the 5th to the 14th of November, 1851.

[Since the above was written the official declaration of the number of votes upon the questions submitted to the electors of Massachusetts, in November last, have reached this country. The votes for the proposed new Constitution were—yeas, 63,222; nays, 68,150; majority against, 4928. *For Sectarian Schools*, 65,111; against, 65,512; majority against, 401. While, therefore, a purely secular system is being advocated here, on the strength of the example of Massachusetts, public opinion there is evidently undergoing a change upon that subject.]

contracts granted by public officers to individuals. But this book has been written, not to excite irritation, or designedly to give offence, or for the purposes of flattery, or to encourage national self-complacency, but simply to illustrate great political principles, in their ordinary and natural action. I therefore confine myself to the following summary, which has the appearance of being authentic, and which, if so, contributes to the proof that democratic majorities are not always the most careful guardians of the public purse :—

(From the *Daily National Intelligencer.*)

Washington, Sept. 25, 1853.

" Amount of Appropriations reported at the last Session of Congress, by the Committee of Ways and Means, for the Service of the Year ending June 30, 1853 :—

	Dollars.
Civil and Diplomatic	6,052,770
Invalid Pensions	1,366,240
Navy ditto	45,000
Indian Department	879,000
Army	7,396,775
Military Academy	135,958
Fortifications	141,500
Rivers and Harbours	1,501,290
Navy	6,705,467
Transportation of Mail by Ocean Steamers	1,467,250
Lighthouses	497,025
	26,188,275

In the passage through the House of Representatives the Democratic majority added to the above sum, as follows :—

	Dollars.	Dollars.
Civil and Diplomatic . . .	1,341,502	
Indian Appropriations . .	431,861	
Rivers and Harbours . . .	45,000	
Navy	20,000	
Ocean Mail Steamers . .	473,000	
Lighthouses	31,000	
		2,342,363

"With these additions the bills went to the Senate, where the Democratic majority thought their brethren of the Lower House had not put their hands deep enough into the public Treasury, and they piled on the following accounts in addition:—

Civil and Diplomatic . . .	904,014	
Indian Affairs	675,565	
Army	840,167	
Military Academy	3,100	
Rivers and Harbours . . .	578,000	
Navy	231,250	
Lighthouses	181,120	
		3,413,216
In addition to these there were "indefinite appropriations," *i. e.* "appropriations without specifying the amounts for the different items respectively		1,300,000
Total		7,035,712"*

It thus appears that (to take the lowest sum) 7,035,712 dollars (upwards of £1,400,000) were added to the expenditure of 1852–3 by Congress, beyond the sum (26,188,275 dollars, about £5,300,000) thought necessary by the Com-

* This is the total given; but the figures make it 7,055,579.

mittee of Ways and Means for the year; or, in other words, an addition of nearly 28 per cent. to the sum they had thought sufficient for the public service.

It is further to be borne in mind that this Democratic majority was in opposition to the general policy of the President and his Ministers, who were of the Whig party.

Note XV.

Presidents of the United States from the adoption of the Constitution:—

1. George Washington .....April 30, 1789, to March 3, 1797.
2. John Adams .....March 4, 1797, to March 3, 1801.
3. Thomas Jefferson .....March 4, 1801, to March 3, 1809.
4. James Madison .....March 4, 1809, to March 3, 1817.
5. James Munroe .....March 4, 1817, to March 3, 1825.
6. John Quincy Adams .....March 4, 1825, to March 3, 1829.
7. Andrew Jackson.....March 4, 1829, to March 3, 1837.
8. Martin Van Buren .....March 4, 1837, to March 3, 1841.
9. Wm. Henry Harrison ...March 4, 1841, to April 4, 1841.
10. John Tyler .....April 4, 1841, to March 3, 1845.
11. James Knox Polk .....March 4, 1845, to March 3, 1849.
12. Zachary Taylor .....March 4, 1849, to July 9, 1850.
13. Millard Fillmore .....July 9, 1850, to March 3, 1853.
14. Franklin Pierce .....March 4, 1853.

NOTE XVI.

LIST OF STATES.

THE THIRTEEN ORIGINAL STATES:—

	Population in 1850.		Population in 1850.
1. New Hampshire	317,864	8. Delaware	91,535
2. Massachusetts	994,499	9. Maryland	583,035
3. Rhode Island	147,544	10. Virginia	1,421,081
4. Connecticut	370,791	11. North Carolina	868,903
5. New York	3,090,022	12. South Carolina	668,507
6. New Jersey	489,333	13. Georgia	905,999
7. Pennsylvania	2,311,681		

NEW STATES:—

	Admitted into the Union, A.D.	Population in 1850.
14. Vermont	1791	313,611
15. Kentucky	1792	982,405
16. Tennessee	1796	1,002,625
17. Ohio	1802	1,977,031
18. Louisiana	1812	500,763
19. Indiana	1816	988,734
20. Mississippi	1817	592,853
21. Illinois	1818	858,298
22. Alabama	1819	771,671
23. Maine	1820	583,088
24. Missouri	1821	682,043
25. Arkansas	1836	209,639
26. Michigan	1837	397,654
27. Florida	1845	87,387
28. Texas	1845	187,403
29. Iowa	1846	192,214
30. Wisconsin	1848	304,226
31. California	1850	200,000

TERRITORIES:—

	Admitted into the Union, A.D.	Population in 1850.
Oregon	1848	20,000
Minesota	1849	6,192
Utah (Mormon Valley)	1850	25,000
New Mexico	1850	
Nebrasca (about to be organised)	1854	No return
District of Columbia	1791	48,000
Total Population		23,269,498

APPENDIX.

(See page 147.)

AN ACT TO PREVENT FRAUDS UPON THE TREASURY OF THE UNITED STATES.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all transfers and assignments hereafter made of any claim upon the United States, or any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefore; and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or any part or share thereof, shall be absolutely null and void, unless the same shall be freely made and executed in the presence of at least two attesting witnesses, after the allowance of such claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof.

SEC. 2. *And be it further enacted,* That any officer of the United States, or person holding any place of trust or profit, or discharging any official function under or in connection with any executive department of the Government of the United States, or under the Senate or House of Representatives of the United States, who, after the passage of this Act, shall act as an agent or attorney for pro-

secuting any claim against the United States, or shall in any manner, or by any means otherwise than in the discharge of his proper official duties, aid or assist in the prosecution or support of any such claim or claims, or shall receive any gratuity, or any share of or interest in any claim, from any claimant against the United States, with intent to aid or assist, or in consideration of having aided or assisted in the prosecution of such claim, shall be liable to indictment as for a misdemeanor in any court of the United States having jurisdiction thereof, and, on conviction, shall pay a fine not exceeding five thousand dollars, or suffer imprisonment in the penitentiary not exceeding one year, or both, as the court in its discretion shall adjudge.

SEC. 3. *And be it further enacted*, That any senator or representative in Congress who, after the passage of this Act, shall, for compensation paid or to be paid, certain or contingent, act as agent or attorney for prosecuting any claim or claims against the United States, or shall in any manner, or by any means, for such compensation, aid or assist in the prosecution or support of any such claim or claims, or shall receive any gratuity or any share of or interest in any claim, from any claimant against the United States, with intent to aid or assist, or in consideration of having aided or assisted, in the prosecution of said claim, shall be liable to indictment as for a misdemeanor in any court of the United States having jurisdiction thereof, and, on conviction, shall pay a fine not exceeding five thousand dollars, or suffer imprisonment in the penitentiary not exceeding one year, or both, as the court in its discretion shall adjudge.

SEC. 4. *And be it further enacted*, That any person who shall wilfully and knowingly destroy, or attempt to destroy,

or, with intent to steal or destroy, shall take and carry away any record, paper, or proceeding of a court of justice, filed or deposited with any clerk or officer of such court, or any paper or document or record filed or deposited in any public office, or with any judicial or public officer, shall, without reference to the value of the record, paper, document, or proceeding so taken, be deemed guilty of felony, and, on conviction in any court of the United States having jurisdiction thereof, shall pay a fine not exceeding two thousand dollars, or suffer imprisonment in a penitentiary not exceeding three years, or both, as the court in its discretion shall adjudge.

SEC. 5. *And be it further enacted*, That any officer having the custody of any record, document, paper, or proceeding specified in the last preceding section of this Act, who shall fraudulently take away, or withdraw, or destroy any such record, document, paper, or proceeding filed in his office, or deposited with him, or in his custody, shall be deemed guilty of felony in any court of the United States having jurisdiction thereof, and, on conviction, shall pay a fine not exceeding two thousand dollars, or suffer imprisonment in a penitentiary not exceeding three years, or both, as the court in its discretion shall adjudge, and shall forfeit his office, and be for ever afterwards disqualified from holding any office under the Government of the United States.

SEC. 6. *And be it further enacted*, That if any person or persons shall, directly or indirectly, promise, offer, or give, or cause or procure to be promised, offered, or given, any money, goods, right in action, bribe, present, or reward, or any promise, contract, undertaking, obligation, or security for the payment or delivery of any money, goods, right in action, bribe, present, or reward, or any other valuable

thing whatever, to any member of the Senate or House of Representatives of the United States after his election as such member, and either before or after he shall have qualified and taken his seat, or to any officer of the United States, or person holding any place of trust or profit, or discharging any official function under, or in connection with any department of the Government of the United States, or under the Senate or House of Representatives of the United States, after the passage of this Act, with intent to influence his vote or decision on any question, matter, cause, or proceeding, which may then be pending, or may by law, or under the Constitution of the United States be brought before him in his official capacity, or in his place of trust or profit, and shall be thereof convicted, such person or persons so offering, promising, or giving, or causing or procuring to be promised, offered, or given, any such money, goods, right in action, bribe, present, or reward, or any promise, contract, undertaking, obligation, or security for the payment or delivery of any money, goods, right in action, bribe, present, or reward, or other valuable thing whatever, and the member, officer, or person, who shall in any wise accept or receive the same, or any part thereof, shall be liable to indictment, as for a high crime and misdemeanor, in any court of the United States having jurisdiction for the trial of crimes and misdemeanors; and shall, upon conviction thereof, be fined not exceeding three times the amount so offered, promised, or given, and imprisoned in a penitentiary not exceeding three years; and the person convicted of so accepting or receiving the same, or any part thereof, if an officer or person holding any such place of trust or profit as aforesaid, shall forfeit his office or place; and any person so convicted under this section shall for ever be disqualified

to hold any office of honour, trust, or profit, under the United States.

SEC. 7. *And be it further enacted*, That the provisions of this Act, and of the Act of July twenty-ninth, eighteen hundred and forty-six, entitled "An Act in relation to the payment of claims," shall apply and extend to all claims against the United States, whether allowed by special Acts of Congress, or arising under general laws or treaties, or in any other manner whatever.

SEC. 8. *And be it further enacted*, That nothing in the second and third sections of this Act contained shall be construed to apply to the prosecution or defence of any action or suit in any judicial court of the United States.

Approved February 26, 1853.

CONSTITUTION

OF THE

UNITED STATES OF AMERICA.

We, the people of the United States, in order to form a more perfect union, establish justice, ensure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

Section 1.

1. All legislative powers herein granted shall be vested in a congress of the United States, which shall consist of a senate and house of representatives.

Section 2.

1. The house of representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

2. No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

3. Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each state shall have at least one representative; and, until such enumeration shall be made, the state of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

4. When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.

5. The house of representatives shall choose their speaker and other officers, and shall have the sole power of impeachment.

SECTION 3.

1. The senate of the United States shall be composed

of two senators from each state, chosen by the legislature thereof, for six years; and each senator shall have one vote.

2. Immediately after they shall be assembled, in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen, by resignation or otherwise, during the recess of the legislature of any state, the executive thereof may make temporary appointments, until the next meeting of the legislature, which shall then fill such vacancies.

3. No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state for which he shall be chosen.

4. The vice-president of the United States shall be president of the senate, but shall have no vote unless they be equally divided.

5. The senate shall choose their other officers, and also a president *pro tempore*, in the absence of the vice-president, or when he shall exercise the office of president of the United States.

6. The senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the president of the United States is tried, the chief justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present.

7. Judgment, in cases of impeachment, shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honour, trust, or profit, under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law.

SECTION 4.

1. The times, places, and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; but the congress may at any time, by law, make or alter such regulations, except as to the places of choosing senators.

2. The congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

SECTION 5.

1. Each house shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorised to compel the attendance of absent members, in such manner, and under such penalties, as each house may provide.

2. Each house may determine the rules of its proceedings, punish its members for disorderly behaviour, and, with the concurrence of two-thirds, expel a member.

3. Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may, in their judgment, require secrecy; and the yeas and nays of the members of either house on any ques-

tion shall, at the desire of one-fifth of those present, be entered on the journal.

4. Neither house, during the session of congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

Section 6.

1. The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall, in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place.

2. No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States, shall be a member of either house during his continuance in office.

Section 7.

1. All bills for raising revenue shall originate in the house of representatives; but the senate may propose or concur with amendments, as on other bills.

2. Every bill which shall have passed the house of representatives and the senate shall, before it become a law, be presented to the president of the United States; if he approve he shall sign it, but if not he shall return it, with

his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If, after such reconsideration, two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and, if approved by two-thirds of that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the president within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the congress, by their adjournment, prevent its return, in which case it shall not be a law.

3. Every order, resolution, or vote, to which the concurrence of the senate and house of representatives may be necessary (except on a question of adjournment), shall be presented to the president of the United States; and, before the same shall take effect, shall be approved by him, or, being disapproved by him, shall be repassed by two-thirds of the senate and house of representatives, according to the rules and limitations prescribed in the case of a bill.

Section 8.

The congress shall have power—

1. To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, im-

posts, and excises, shall be uniform throughout the United States:

2. To borrow money on the credit of the United States:

3. To regulate commerce with foreign nations, and among the several states, and with the Indian tribes:

4. To establish an uniform rule of naturalisation, and uniform laws on the subject of bankruptcies throughout the United States:

5. To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures:

6. To provide for the punishment of counterfeiting the securities and current coin of the United States:

7. To establish post-offices and post-roads:

8. To promote the progress of science and useful arts, by securing, for limited times, to authors and inventors the exclusive right to their respective writings and discoveries:

9. To constitute tribunals inferior to the supreme court:

10. To define and punish piracies, and felonies committed on the high seas, and offences against the law of nations:

11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water:

12. To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years:

13. To provide and maintain a navy:

14. To make rules for the government and regulation of the land and naval forces:

15 To provide for calling forth the militia to execute

the laws of the Union, suppress insurrections, and repel invasions:

10. To provide for organising, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by congress:

17. To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square), as may, by cession of particular states, and the acceptance of congress, become the seat of government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings:—And

18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

Section 9.

1. The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

2. The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

3. No bill of attainder or *ex post facto* law shall be passed.

4. No capitation, or other direct tax shall be laid, unless in proportion to the *census*, or enumeration hereinbefore directed to be taken.

5. No tax or duty shall be laid on articles exported from any state. No preference shall be given, by any regulation of commerce or revenue, to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another.

6. No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

7. No title of nobility shall be granted by the United States: And no person holding any office of profit or trust under them shall, without the consent of the congress, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state.

Section 10.

1. No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.

2. No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its

inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress. No state shall, without the consent of congress, lay any duty of tonnage, keep troops, or ships of war, in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

ARTICLE II.

Section 1.

1. The executive power shall be vested in a president of the United States of America. He shall hold his office during the term of four years, and together with the vice-president, chosen for the same term, be elected as follows:—

2. Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of senators and representatives to which the state may be entitled in the congress: but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

3. The electors shall meet in their respective states, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same state with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit, sealed, to the seat of the government of the United States, directed to

the president of the senate. The president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the president, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the house of representatives shall immediately choose by ballot one of them for president; and if no person have a majority, then, from the five highest on the list the said house shall in like manner choose the president. But in choosing the president the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. In every case, after the choice of the president, the person having the greatest number of votes of the electors shall be the vice-president. But if there should remain two or more who have equal votes, the senate shall choose from them by ballot the vice-president.

4. The congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

5. No person, except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of president; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

6. In case of the removal of the president from office,

or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice-president, and the congress may by law provide for the case of removal, death, resignation, or inability, both of the president and vice-president, declaring what officer shall then act as president, and such officer shall act accordingly, until the disability be removed, or a president shall be elected.

7. The president shall, at stated times, receive for his services, a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States or any of them.

8. Before he enter on the execution of his office, he shall take the following oath or affirmation:

9. "I do solemnly swear (or affirm), that I will faithfully execute the office of president of the United States, and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States."

Section 2.

1. The president shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

2. He shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds

of the senators present concur; and he shall nominate, and, by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the congress may by law vest the appointment of such inferior officers, as they think proper, in the president alone, in the courts of law, or in the heads of departments.

3. The president shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions, which shall expire at the end of their next session.

Section 3.

1. He shall from time to time give to the congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

Section 4.

1. The president, vice-president, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

ARTICLE III.

Section 1.

1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the congress may from time to time ordain and establish. The Judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

Section 2.

1. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, between a state and citizens of another state, between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens, or subjects.

2. In all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the congress shall make.

3. The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed.

SECTION 3.

1. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

2. The congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.

ARTICLE IV.

SECTION 1.

1. Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

SECTION 2.

1. The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

2. A person charged in any state with treason, felony,

or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

3. No person held to service or labour in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labour, but shall be delivered up on claim of the party to whom such service or labour may be due.

Section 3.

1. New states may be admitted by the congress into this Union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned, as well as of the congress.

2. The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

Section 4.

1. The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.

ARTICLE V.

1. The congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several states or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the congress: Provided, that no amendment, which may be made prior to the year one thousand eight hundred and eight, shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the senate.

ARTICLE VI.

1. All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the confederation.

2. This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

3. The senators and representatives before mentioned, and the members of the several state legislatures, and all

executive and judicial officers, both of the United States and of the several states, shall be bound, by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII.

1. The ratification of the conventions of nine states shall be sufficient for the establishment of this Constitution between the states so ratifying the same.

AMENDMENTS TO THE CONSTITUTION.

ARTICLE I.

CONGRESS shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

ARTICLE II.

A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

ARTICLE III.

No soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war, but in a manner to be prescribed by law.

ARTICLE IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall he be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour; and to have the assistance of counsel for his defence.

ARTICLE VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

ARTICLE VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX.

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

ARTICLE X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

ARTICLE XI.

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

ARTICLE XII.

1. The electors shall meet in their respective states, and vote by ballot for president and vice-president, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in the ballots the person voted for as president, and in distinct ballots the person voted for as vice-president; and they shall make distinct lists of all persons voted for as president, and of all persons voted for as vice-president, and of the number of votes for each, which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the senate; the president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted: the person having the greatest number of votes for president, shall be the pre-

sident, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers, not exceeding three, on the list of those voted for, as president, the house of representatives shall choose immediately, by ballot, the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the house of representatives shall not choose a president whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the vice-president shall act as president, as in the case of the death or other constitutional disability of the president.

2. The person having the greatest number of votes as vice-president, shall be the vice-president, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then from the two highest numbers on the list, the senate shall choose the vice-president: a quorum for the purpose shall consist of two-thirds of the whole number of senators, a majority of the whole number shall be necessary to a choice.

3. But no person constitutionally ineligible to the office of president, shall be eligible to that of vice-president of the United States.

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